1992

Robert D. Radcliffe v. Sia Akhavan and Does 1 through 10 : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

Robert D. Radcliffe,
Plaintiff,

v.

Sia Akhavan, an individual; Joel M. Lasalle, an individual; General Display Corporation, a Utah corporation; and Does 1 through 10, inclusive,
Defendants and Appellee

Case No. 920883-CA

Priority No. 15

Sia Akhavan,
Counterclaimant and Appellee,

v.

Robert D. Radcliffe; Republic International Corporation; Roland Kaufmann; and Does 1 through 10, inclusive,
Counterclaim Defendants and Appellant.

BRIEF OF APPELLANT

Appeal from a Judgment of the Third Judicial District Court of Salt Lake County, State of Utah. Honorable James S. Sawaya, District Judge.

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IN THE UTAH COURT OF APPEALS

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BRIEF OF APPELLANT ROLAND KAUFMANN

JURISDICTION

This appeal is from a final default order and judgment of the Third Judicial District Court of Salt lake County, State of Utah. The judgment was entered on July 16, 1992. The Notice of Appeal was filed on August 17, 1992. The jurisdiction of the Utah Court of Appeals rests upon Utah Code Ann. §78-2a-3(2)(j)(1991).

ISSUES PRESENTED FOR REVIEW

1. Whether a foreign, nonresident counterclaim defendant was unreasonably denied the right to an evidentiary hearing to contest the assertion of specific personal jurisdiction over him and/or defend on the merits by the denial of his motion for continuance of trial date following notice of withdrawal and subsequent nonappearance of his out-of-state trial counsel.

The standard of review on this issue is whether the trial court abused its discretion under the particular facts and circumstances of the case. Christenson v. Jewkes, 761 P.2d 1375, 1377 (Utah 1988).

2. Whether a foreign, nonresident counterclaim defendant was unreasonably denied the right to an evidentiary hearing to contest the assertion of specific personal jurisdiction over him and/or defend on the merits by the entry of default judgment against him following notice of withdrawal and subsequent nonappearance of his out-of-state trial counsel.

The standard of review on this issue is whether the trial court abused its discretion under the particular facts and circumstances of the case. Griffiths v. Hammon, 560 P.2d 1375 (Utah 1977).

3. Whether the evidence was legally sufficient to support a finding that a foreign, nonresident counterclaim defendant voluntarily submitted to the court's jurisdiction over him by stipulation in this case.

The standard of review on this issue is whether the lower court's findings were clearly erroneous. Kamdar & Co. v. Laray Co. Inc., 815 P.2d 245 (Utah App. 1991).

4. Whether lost earnings allegedly suffered by the seller as a result of honoring a covenant not to compete in a contract for the sale of a business can be recovered as consequential damages in addition to an award of compensatory damages for the full value of the sales price.

The lower court's conclusion of law on this issue is reviewed under a correction of error standard. Bailey v. Call, 767 P.2d 138 (Utah App.), cert. denied, 773 P.2d 45 (Utah 1989).

DETERMINATIVE PROVISIONS OF LAW

Although this appeal challenges several rulings of the lower court pursuant to Utah R. Civ. P. 16(d) and 40(b) respectively in the context of the court's assertion of specific personal jurisdiction over a foreign, nonresident defendant, it does not turn on the proper interpretation of these provisions per se. They are, therefore, reproduced in the Appendix for convenience only.

CONSTITUTIONAL PROVISIONS

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STATEMENT OF THE CASE

NATURE OF THE CASE

This case was commenced by the plaintiff, Robert Radcliffe, as an action for damages based upon fraudulent misrepresentations allegedly made by the defendant and appellee, Sia Akhavan, and others in connection with an agreement for the purchase and sale of Akhavan's equity interest in General Display Corporation in October, 1989. (R. 2-10). Radcliffe alternatively prayed for rescission of the agreement and restitution of his initial payment thereunder. (R. 9-10).

Akhavan responded by filing an answer and counterclaim against Radcliffe, Republic International Corporation, Roland Kaufmann, a Swiss investment banker and the appellant herein, and several unnamed others alleging, inter alia, breach of contract (Radcliffe only), fraud and violations of state securities laws (Radcliffe, Republic, and Kaufmann). (R. 18-27). The assertion of specific personal jurisdiction over Kaufmann was based upon the disputed allegations that he: (1) maintained a residence in Salt Lake County; and (2) caused an injury within the State of Utah. (R. 19).

COURSE OF PROCEEDINGS

The jurisdictional issue was contested by the parties in a battle of memoranda and conflicting affidavits from the outset of the litigation on the counterclaim. Following a nonevidentiary hearing on Kaufmann's motion to dismiss, the court ruled that Akhavan had established a prima facie case based on the documentary record alone. (R. 666-67). Kaufmann then filed an answer duly preserving his jurisdictional objections as an affirmative defense, and the case was ultimately scheduled for trial. (R. 678; 928).

On June 17, 1992, Kaufmann's out-of-state lawyer filed a notice and motion for leave to withdraw as counsel indicating that he did not intend to appear at the trial on July 7, 1992. (R. 959-65). Kaufmann then retained new counsel who immediately moved for a continuance of trial date in order to obtain adequate time to prepare the defense. (R. 979). Following a brief hearing on July 6, 1992, the court denied the motion and ordered the trial to proceed the following day. (R. 1044).

DISPOSITION BELOW

At this point in the proceedings, the other parties had settled their differences leaving only the counterclaim against Kaufmann for trial. (R. 992; 1024; 1039; 1057). The trial was held as scheduled on July 7, 1992. Neither Kaufmann nor his trial counsel appeared. Unchallenged evidence was introduced by Akhavan and a default judgment in the amount of $566,570.12 was entered against Kaufmann including an award of both compensatory and

consequential damages. (R. 1050). He then filed this appeal. (R. 1066).

STATEMENT OF FACTS

INTRODUCTION

This case arises from a series of meetings and negotiations among various individuals and corporate entities during the latter half of 1989, which culminated in an agreement to purchase Sia Akhavan's equity interest in General Display Corporation. Litigation commenced when the proposed financing arrangements supporting the agreement failed to materialize. The material issues of fact turn on the precise intentions, contacts, representations, and roles of the various individuals and entities involved. Since these disputed issues are the same ones which create a legal basis for the assertion of specific personal jurisdiction over the counterclaim defendant and appellant, Roland Kaufmann, and since they constitute the basis of his defenses on the merits, a brief recitation of those facts will be presented here.

PARTIES

1. Sia Akhavan, is an individual resident of Salt Lake County. (R. 264). From June 21, 1988, to October, 1989, he was a shareholder, officer, and director of General Display Corporation. (R. 264).

2. General Display Corporation (hereinafter "General Display") is a Utah corporation engaged in the business of

designing, fabricating, and installing electric signs for commercial clients. (R. 20).

3. Joel M. LaSalle, an individual, was president of General Display during the time periods involved herein. (R. 113). (Neither LaSalle nor General Display are parties to this appeal.)

4. Plaintiff Robert D. Radcliffe is a resident of Salt Lake County and president of Republic International Corporation. (R. 3; 19).

5. Republic International Corporation (hereinafter "Republic") is a Utah Corporation which maintains offices in Salt Lake County. (R. 273). (Neither Radcliffe nor Republic is a party to this appeal.)

6. Roland Kaufmann, is a Swiss investment banker and resident of Zurich, Switzerland. (R. 525-27). Although he once briefly served as an officer and director of Republic, he had resigned from the company prior to the events alleged in the counterclaim. (R. 194; 526).

7. Emanuel A. Floor, an individual business associate of Robert Radcliffe, was involved as a participant in the negotiations at issue herein. (R. 195-96).

8. Electra-Graphics International, Inc. (hereinafter EGI) is a Utah corporation of which Emanuel Floor is president. (R. 266). EGI contracted to purchase certain assets of General Display in July of 1989, shortly before the transactions leading to the counterclaim. (R. 203-08). (Neither Floor nor EGI is a party to this appeal.)

TRANSACTIONAL FACTS

In June or July of 1989, Radcliffe and Emanuel Floor, acting either individually or on behalf of Republic, entered into negotiations with Akhavan, Joel LaSalle, and General Display for the purchase of certain computer programs, graphic displays, and other assets owned by the company. (R. 266). These negotiations resulted in a Letter Agreement executed by General Display, Akhavan, LaSalle, and Elektra-Graphics International, on July 27, 1989. (R. 266; 203). Elektra-Graphics was a Utah corporation organized as a vehicle for the purchase and development of the business. (R. 266). Under this proposal, Republic was to finance certain aspects of the transaction under a side agreement with EGI. (R. 266; 207). (Radcliffe denied Akhavan's claim that Republic was also to become a shareholder and control the company.) (R. 266; 195). Although Republic did provide funding of $100,000, the transaction was ultimately abandoned. (R. 267). Although Akhavan claimed in an affidavit that the transaction was cancelled at Kaufmann's request, (R. 267), this contention was denied by both Kaufmann and Radcliffe. (R. 527; 778).

The facts surrounding Kaufmann's involvement in the next round of negotiations are also in dispute as illustrated by the conflicting affidavits themselves.

AKHAVAN:

"13. On or about August 12, 1989, LaSalle and I attended a meeting with Kaufmann, Radcliffe and Floor. Kaufmann proposed that he purchase a fifty percent (50%) interest in General Display on

behalf of Republic or another one of his corporations. Kaufmann offered $2.8 million for fifty percent (50%) of General Display and indicated that he would subsequently do a public offering to generate between $2 million and $3 million." (R. 267).

RADCLIFFE:

"9. Paragraph 13 of the AKHAVAN Affidavit is untrue. I was present at the meeting held on August 12, 1989 by and between KAUFMANN, RADCLIFFE, Emanuel A. Floor (hereinafter "FLOOR"), LASALLE and AKHAVAN. KAUFMANN made no offer concerning a 50% interest in General Display Corporation (hereinafter "GENERAL DISPLAY") for $2.8 million or any other amount. No one else at the meeting made such a ludicrous offer. Further, KAUFMANN did not indicate that he would subsequently do a public offering. He did indicate that, as an investment banker, he would introduce GENERAL DISPLAY to various underwriters in New York City who, he felt, would be interested in conducting a public offering for GENERAL DISPLAY." (R. 195-96).

AKHAVAN:

"14. On or about August 17, 1989, Kaufmann invited LaSalle and myself to a meeting with F. N. Wolfe & Company, a New York based securities underwriter. A merger between General Display and a California public company, Bristol Research ("Bristol") was discussed. General Display then presented a letter of interest indicating that the company desired to enter into a Merger Agreement with Bristol, obtain bridge financing in the amount of $500,000.00 and commit to an underwriting which would result in $5

million to $6 million being raised for the merged Bristol/General Display Corporation." (R. 267).

RADCLIFFE:

"10. In paragraph 14 of the AKHAVAN Affidavit, AKHAVAN fails to attach the letter he wrote to Bristol Research Corporation (hereinafter "BRISTOL") from GENERAL DISPLAY. A true and correct copy of that letter is attached hereto as Exhibit "B". Further, AKHAVAN fails to attach the letter from F. N. Wolfe & Co. Inc. to BRISTOL which he signed. A true and correct copy of that letter is attached hereto as Exhibit "C". KAUFMANN, RADCLIFFE, FLOOR, and REPUBLIC are not parties to these documents." (R. 196).

AKHAVAN:

"15. Under the provisions of the agreement to merge with Bristol, I was to serve as Chairman of the Board and Chief Executive Officer of the merged company. On or about August 28, 1989 I visited Bristol's manufacturing plant in Costa Mesa, California and met with the Board of Directors of Bristol." (R. 268).

"16. Around this time, Floor, Kaufmann and Radcliffe began representing to other parties that Floor was the Chairman of the Board of General Display. In fact, this was not true and was not consistent with the previous negotiations. For this and other reasons, I was unwilling to commit my interest in General Display to the merger. However, in an effort to accommodate the parties I agreed to sell my interest thereby allowing General Display to continue with the merger." (R. 268).

RADCLIFFE:

"11. Paragraphs 15 and 16 of the AKHAVAN Affidavit are untrue. I was present at the board of directors meeting of BRISTOL. FLOOR was introduced as chairman of the board of GENERAL DISPLAY and neither AKHAVAN nor LASALLE made any objection. Further, at the meeting, an election was held and FLOOR was elected as chairman of the board of BRISTOL so that the merger could be concluded efficiently." (R. 196).

"12. On or about September 23, 1989, Kelly J. Flint, attorney for GENERAL DISPLAY wrote a letter to F.N. Wolfe and Company that GENERAL DISPLAY was interested in concluding the merger with BRISTOL. Therefore, AKHAVAN's statement in paragraph 16 of his Affidavit that he was unwilling to commit his interest in GENERAL DISPLAY to the merger is patently false, at least until after September 23, 1989." (R. 196-97).

AKHAVAN:

"17. Throughout this time I assumed that Kaufmann, acting through Republic, Radcliffe and/or Floor, would purchase my interest in General Display. It is my understanding that Radcliffe and Floor are merely fronts for Roland Kaufmann. In fact, Kaufmann represented to me on more than one occasion that he was "the money man" and Radcliffe and Floor were fronts for him. Kaufmann also represented that he "owned" Republic along with two other public companies. Radcliffe also stated that Kaufmann "owned" Republic and "called the shots" with respect to the Company. Radcliffe told me that after the closing of the Agreement to purchase my stock,

Kaufmann would nominate which company would hold the General Display interests." (R. 268).

RADCLIFFE:

"13. Paragraph 17 of AKHAVAN'S Affidavit is false. I commenced negotiation to purchase AKHAVAN'S stock on or about October 1, 1989 as an individual and not as an officer of REPUBLIC. I conducted and concluded those negotiations as an individual and not on behalf of anyone else. As stated in my deposition, there were discussions that I may assign my interest to a third party; however, none of those potential assignments were consummated. I never made any representation to anyone that KAUFMANN "owned" REPUBLIC. REPUBLIC is a publicly-traded company and the stock ownership is clearly reflected in public documents on file." (R. 197).

"5g. Roland Kaufmann has never stated to anyone in my presence that he "owns" Republic. If he had ever done so, I would have corrected him at that moment." (R. 776).

AKHAVAN:

"18. Thereafter, I entered into negotiations with Kaufmann, Radcliffe, and Floor who I believed were acting individually and on behalf of Republic, for the purchase of my interest in General Display. On or about October 20, 1989, an agreement entitled "Memorandum of Oral Agreement by and between Robert D. Radcliffe and Sia Akhavan Re: General Display Corporation" was executed memorializing the sale of my interest in General Display. A true and correct copy of this Memorandum of Oral Agreement is attached

hereto as Exhibit "E". Kaufmann was instrumental in negotiating the terms and conditions of the October 20, 1989 Agreement." (R. 269).

RADCLIFFE:

"14. Paragraph 18 of the AKHAVAN Affidavit is false. I personally had negotiations with Mr. Michael Katz, of the law offices of Burbidge & Mitchell, who acted on behalf of AKHAVAN. These negotiations commenced on or about October 1, 1989 and culminated in the October 19 Memorandum attached to the AKHAVAN Affidavit as Exhibit "E". To my knowledge, KAUFMANN had no negotiations whatsoever with Mr. Katz or AKHAVAN. At no time did Mr. Katz or AKHAVAN suggest that KAUFMANN, FLOOR or REPUBLIC be included as parties to my purchase agreement. It is clear from the agreement that my own personal stock in REPUBLIC was contemplated to be used to collateralize the agreement." (R. 197-98).

In the hearing on July 7, 1992, and in the absence of Radcliffe, Kaufmann, or Kaufmann's attorney, Akhavan presented unchallenged testimony regarding the facts and circumstances supporting his theory of liability. (Tr. 3-10). The main points of that testimony may be summarized as follows:

1. Akhavan learned from Joel LaSalle that "Kaufmann" was interested in buying his interest in General Display in September, 1989. (Tr. 3-4; Finding of Fact No. 6, R. 1044).

2. Akhavan met with Radcliffe and Floor whom he understood were acting as Kaufmann's agents in early October, 1989, to discuss the terms of the deal. (Tr. 4; Finding of Fact No. 6, R. 1044).

3. At that meeting, a purchase price for Akhavan's equity interest was agreed upon, but the terms of payment were not. (Tr. 4; 6-7; Finding of Fact No. 6, R. 1044).

4. Akhavan subsequently met later that month with Kaufmann himself "at his offices in Fort Union Boulevard" and negotiated the remaining terms of the deal. (Tr. 5; Findings of Fact Nos. 8, 9, R. 1044-45).

5. At this meeting, Radcliffe was directed by Kaufmann to draft the purchase agreement on his behalf. (Tr. 5-6).

6. The agreement dated october 19, 1989, which was signed by Radcliffe (individually) and Akhavan contains the terms of the agreement with "Kaufmann." (Tr. 5; Finding of Fact No. 9, R. 1044-45). The agreement itself is attached hereto as Addendum F.

At the hearing on July 7, 1992, Akhavan also presented unchallenged testimony regarding damages. That testimony was summarized in the court's Finding of Fact No. 9 as follows:

"(a) Purchase price of $300,000.00, payable $50,000.00 immediately with the balance of $250,000.00 to be paid over 18 months at an interest rate of 10%;

(b) Akhavan agreed not to work or compete in the commercial signage industry. This covenant not to compete was for a period of two years;

(c) Kaufmann and Akhavan agreed that Akhavan would receive 25% of the net proceeds from any judgment or settlement of the lawsuit entitled General Display Corporation v. The Walt Disney Company; and

(d) If any lawsuit arose from their agreements, the prevailing party would be entitled to attorney's fees."

Although Akhavan was paid $50,000 initially, he was not paid the other amounts owed under the contract. (Tr. 7-8; Finding of Fact No. 12, R. 1046).

Although not challenged at the hearing, much of Akhavan's testimony was controverted by affidavits previously filed.

RADCLIFFE:

"6. KAUFMANN has no designated office at REPUBLIC. As an investment banker, it is customary for him to make periodic inspection trips to companies in which he has caused the placement of funds. As a courtesy, REPUBLIC has made a private office available to him, which we do for any visitors. Paragraph 8 of AKHAVAN's Affidavit therefore mischaracterizes RADCLIFFE's deposition testimony." (R. 195).

"6a. On or about October 20, 1989, Sia Akhavan entered into a written Memorandum of Oral Agreement to sell his 50% interest in General Display to me. A down payment of $50,000 was made, however, the share certificate, later issued, was never transferred or endorsed to me. There is no provision in the agreement whereby I am required to assign any purported stock interest to any unnamed third parties." (R. 776-77).

"e. Roland Kaufmann did not have authority to make final decisions with regards to Republic International Corporation or Radcliffe, assuming that is what Akhavan means by his statement contained in paragraph 7 of his Affidavit. Further, Mr. Kaufmann

has never used Republic or me as a "front or an "alter-ego" as asserted in paragraph 7." (R. 778-79).

Finally, in his own affidavit, Kaufmann clearly stated that: KAUFMANN:

"Contrary to the allegations of Counterclaimant, I do not own any property in the Salt Lake City area, or anywhere in the State of Utah. My primary residence and domicile is in Zurich Switzerland.

I am not an officer of Republic International Corporation, and was not an officer of that corporation at any time referred to in the Counterclaim.

I am not a shareholder in Republic Corporation, and have not been a shareholder at any time referred to in the Counterclaim.

I am not a shareholder in Republic Corporation, and have not been a shareholder at any time referred to in the Counterclaim.

I do not maintain a place of business or office in the State of Utah. On occasional visits to Utah, I have been permitted the use of an office at Republic International Corporation.

I was not a party to any of the agreements referred to in the Counterclaim, either in an individual or representative capacity. I made no guarantees or commitments, either in an individual or representative capacity to Sia Akhavan, and did not advance any funds or transfer to General Display Corporation any shares of Republic International Stock." (R. 526-27).

PROCEDURAL FACTS

Motion to Dismiss

The factual and legal bases justifying the assertion of personal jurisdiction over Roland Kaufmann were contested several times prior to trial. Personal jurisdiction was disputed by Radcliffe on Akhavan's motion to join Kaufmann as an additional party defendant. (R. 49; 235). It was disputed again pursuant to Kaufmann's motion to vacate default certificate which also challenged Akhavan's attempted service of process in Switzerland. (R. 517; 525). The latter problem was resolved by stipulation of counsel in which it was agreed that Kaufmann's jurisdictional objections would be preserved. (R. 543).

In challenging the personal jurisdiction of the court on his motion to dismiss, Kaufmann denied both the accuracy and legal sufficiency of Akhavan's allegations that he purposefully took any action which would subject him to the jurisdiction of Utah courts. (R. 553-55; 545-52; 525-27; 638). He also denied that he owned any property in Utah or was involved in the transaction in any way other than as the financial advisor and investment banker for Republic. Id. Following a nonevidentiary hearing held on March 4, 1991, the court denied the motion based on the documentary record alone, finding that Kaufmann had sufficient minimal contacts with the forum so as to satisfy the requirements of Utah Code Ann. §78-27-22 et seq. (1969) and the due process requirements of the Fourteenth Amendment to the United States Constitution. (R. 666-67). Kaufmann then filed his Answer to Counterclaim preserving his

jurisdictional objections as an affirmative defense. (R. 671-79, 678).

Trial Settings

On December 11, 1991, this case was set for nonjury trial commencing on March 24, 1992, (R. 891), and a pretrial settlement conference was scheduled in Salt lake City on March 16, 1992. (R. 893). On January 8, 1992, Kaufmann's Washington D.C. counsel filed a motion for continuance of trial date on the grounds that he was scheduled to appear as counsel for plaintiff at a trial in Fairfax County, Virginia, commencing on March 23, 1992. (R. 898). Although Akhavan's counsel objected to the motion (R. 906), it was granted by the court (R. 905), and trial was rescheduled on February 10, 1992, to begin on July 7, 1992. (R. 928).

Motion for Leave to Withdraw as Counsel

Kaufmann was originally represented by the Washington, D.C. law firm of METZGER, GORDON, SCULLY & MORTIMER with Leslie Ann Haacke as local counsel. (R. 528-31). On May 27, 1992, Ms. Haacke notified the court that she had relocated from Salt Lake City to Phoenix, Arizona, thus leaving Kaufmann without benefit of any real "local" counsel. (R. 931).

On June 17, 1992, Kaufmann's Washington D.C. lawyer filed a notice and motion to withdraw as counsel indicating that because of a conflict with his client over payment of attorney's fees, he did not intend to appear at trial on July 7, 1992. (R. 959-65). He also stated that Kaufmann had indicated that he did not intend to have substitute counsel enter an appearance at that time. (R.

961). At this point, Kaufmann had no local counsel in Salt Lake City to represent him. (R. 931).

Motion for Entry of Default Judgment

On June 29, 1992, a pretrial settlement conference was held in Salt Lake City. (R. 1007). Although his Washington D. C. counsel participated in the conference, Kaufmann himself did not appear. (R 1036). At the conference, the court required confirmation from Kaufmann that he did not object to the withdrawal of his counsel and did not intend to appear at trial as a condition of granting the motion to withdraw. (R. 1028). The court apparently also informed Kaufmann's counsel that if no appearance were made at trial, a default judgment would be entered against his client. (R. 1036). Akhavan's counsel served a motion to that effect on July 1, 1992. (R. 1008).

On being advised of the situation, Kaufmann immediately wrote to the court stating that he could not attend trial on July 7, 1992, for financial reasons, and requesting a continuance of trial date until September or October, 1992, to allow sufficient time for new Utah counsel to be retained and prepare his defense. (R. 1037). He also requested that his trial counsel be retained until July 31, 1992. (R. 1037). His Washington D.C. counsel concurrently filed a memorandum in opposition to Akhavan's motion for entry of default judgment on July 1, 1992, citing a conflict of interest with his client. (R. 1027-29).

Motion for Continuance

Kaufmann then retained Paul M. Durham of DURHAM & EVANS in Salt Lake City who entered a special appearance on July 2, 1992, for the sole purpose of moving for a continuance of trial date on the grounds that Kaufmann genuinely desired to appear at trial and defend the action; that he believed he had substantial and meritorious defenses to all of the claims; that he would take all necessary action to assist in preparation for trial; that he and his original counsel had encountered serious and substantial disagreements and misunderstandings to the degree that original counsel could not continue to represent him; that the Motion to Withdraw had not been ruled upon; and that, due to the complexity of the case, new counsel could not adequately prepare for trial without a continuance. (R. 979). Following a brief hearing on July 6, 1992, the court denied the motion. (R. 1044).

Trial was held as scheduled the next day in the absence of both Kaufmann and his trial counsel. (R. 1042-43). Kaufmann's special counsel appeared briefly to make a record with respect to his motion for continuance and was excused. (R. 1043). The court then entered Kaufmann's default and proceeded to take unchallenged testimony from Akhavan and his witnesses on the issues of liability and damages. (R. 1043-47).

Following the hearing, the court entered a default judgment against Kaufmann together with a specific jurisdictional finding to the effect that "Kaufmann was properly served with process in this action and by stipulation agreed and submitted to this court's

jurisdiction over him." (Finding of Fact No. 1, R. 1043; Conclusion of Law No. 1, R. 1047). The court also awarded Akhavan both compensatory and consequential damages for breach of contract and fraud. (R. 1045; 1047-48, R. 1050). This appeal followed. (R. 1066).

SUMMARY OF THE ARGUMENT

I.

THE LOWER COURT ERRED IN DENYING KAUFMANN'S MOTION FOR CONTINUANCE UNDER THE PARTICULAR FACTS AND CIRCUMSTANCES OF THIS CASE.

A. The Lower Court Must Act Reasonably in Denying a Motion for Continuance.

The trial court has discretion to continue a trial upon a showing of good cause. Utah R. Civ. P., Rule 40(b).

The trial court's action in denying a continuance will not be disturbed on appeal unless the court has abused that discretion by acting unreasonably. Hardy v. Hardy, 776 P.2d 917 (Utah App. 1989); Christenson v. Jewkes, 761 P.2d 1375 (Utah 1988); Miller Pontiac, Inc. v. Osborne, 622 P.2d 800 (Utah 1981).

In determining whether to grant a continuance, the trial court should consider the facts and circumstances of each particular case, weighing the rights of the party requesting it against the harm that may result from delay. Butler v. Farner, 704 P.2d 853 (Colo. 1985); 17 Am. Jur. 2d. Continuance §4 (1990).

The trial court's legitimate concern for prevention of delay in the trial of cases should not prejudice the substantial rights of a party by forcing him to go to trial without being able to fairly present his case. Yates v. Superior Court In and For Pima County, 120 Ariz. 436, 586 P.2d 997 (Ariz. App. 1978); Gonzales v. Harris, 189 Colo. 518, 542 P.2d 842 (1975).

B. Kaufmann's Due Process Right to an Evidentiary Hearing on the Jurisdictional Issue was Entitled to Considerable Weight in the Balancing Process.

Kaufmann was entitled to an evidentiary hearing on his objections to the court's assertion of specific personal jurisdiction over him under guidelines recently approved by the Utah Supreme Court, since Akhavan's allegations were specifically controverted by affidavit and because determination of the jurisdictional issue turns on the same facts as the merits of the case. Anderson v. American Soc'y of Plastic Surgeons 807 P.2d 825 (Utah 1990).

In determining whether to grant a continuance, the court should examine the reasonableness of a request in light of the tradition that a party should be afforded every opportunity to be in attendance at trial. Bairas v. Johnson, 13 Utah 2d 269, 373 P.2d 375 (1962).

C. The Lower Court's Denial of a Continuance was Unreasonable Under the Particular Circumstances of This Case.

1. Kaufmann is a foreign, nonresident defendant residing in Zurich, Switzerland who consistently challenged the court's jurisdiction over him.

2. Kaufmann's out-of-state counsel moved to withdraw just three weeks before trial, indicating that he did not intend to appear at the trial.

3. The attorney-client relationship between Kaufmann and his out-of-state counsel had so completely broken down by this time that Kaufmann could not be adequately represented without first obtaining new counsel.

4. Kaufmann retained new Utah counsel on July 1, 1992, who immediately moved for a continuance on the grounds, inter alia, that the case was so complex that he could not adequately defend without additional time to prepare for trial.

5. Kaufmann believes he has substantial and meritorious defenses to all of Akhavan's claims and genuinely desires to appear and defend the action.

6. Akhavan failed to demonstrate any specific prejudice occasioned by a two or three month delay beyond the burden of the delay itself.

7. Kaufmann has suffered severe prejudice by having a default judgment entered against him based in part upon a jurisdictional finding which is not supported by any evidence in the record.

II.

THE LOWER COURT ERRED IN ENTERING DEFAULT JUDGMENT AGAINST KAUFMANN UNDER THE PARTICULAR FACTS AND CIRCUMSTANCES OF THIS CASE.

Because of the close connection between Kaufmann's motion for continuance and Akhavan's motion for entry of default judgment, the same factors considered above in balancing the competing interests of the parties are relevant here. In addition, this court has observed that a default judgment is an unusually harsh remedy that should be meted out with caution. Darrington v. Wade, 812 P.2d 452 (Utah App. 1991). See also, Griffiths v. Hammon, 560 P.2d 1375 (Utah 1977); Utah Sand & Gravel Products Corp. v. Tolbert, 402 P.2d 703 (Utah 1965); Warren v. Dixon Ranch Co., 260 P.2d 741 (Utah 1953).

This is not a case of willfulness, bad faith, or fault which justifies entry of default judgment as a sanction against a noncomplying party. See, Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950 (Utah App. 1989).

The reasonableness of the court's ruling in this case must be viewed from the factual and legal context in which it occurred. Kaufmann was a foreign, nonresident living thousands of miles from the forum who had effectively lost the adequate representation of his out-of-state counsel three weeks prior to trial. He had previously challenged the court's personal jurisdiction over him and was entitled under Utah law to an evidentiary hearing on the issue. He took immediate steps to secure new Utah counsel and move

for a continuance once he had been advised of the court's pretrial rulings. He was prejudiced by entry of default judgment in that he was deprived of a full and fair opportunity to present his case in court.

III.

THE LOWER COURT ERRED IN FINDING THAT KAUFMANN VOLUNTARILY SUBMITTED TO THE COURT'S JURISDICTION IN THIS CASE.

The court's finding of fact and conclusion of law that Kaufmann voluntarily submitted to the court's jurisdiction by stipulation in this case in clearly erroneous, since it is unsupported by any evidence whatsoever and is in fact directly contradicted by all of the evidence in the record.

Kaufmann has been prejudiced by this finding and conclusion, since the stated basis of the court's personal jurisdiction over him is completely groundless.

IV.

THE LOWER COURT ERRED IN AWARDING CONSEQUENTIAL DAMAGES IN THIS CASE, SINCE IT AFFORDED AKHAVAN A DOUBLE RECOVERY.

In Utah, compensatory and consequential damages may be recovered for breach of contract. Beck v. Farmers Ins. Exch., 701 P.2d 795 (Utah 1985). Recoverable damages for fraud are based upon the benefit of the bargain rule. Lamb v. Bangart, 525 P.2d 602, 607 (Utah 1974). Both measures of damages are limited by the rule prohibiting a double recovery. Cook Assoc., Inc. v. Warnick, 664

P.2d 1161 (Utah 1983) (contract); Brown v. Richards, 840 P.2d 143 (Utah App. 1992) (fraud).

In this case, the terms of the contract itself indicate that the covenant not to compete was not separately valued. (R. 289-90). It follows that the consideration given by the buyer for the business included payment for the seller's promise not to compete for a period of two years after the sale, By permitting Akhavan to recover the full amount of the purchase price, the court made him whole under the contract and afforded him the full benefit of his bargain. To go beyond that and permit additional damages measured by the alleged value of honoring his covenant not to compete, the court allowed Akhavan to exact a double recovery in contravention of law.

ARGUMENT

I.

THE LOWER COURT ABUSED ITS DISCRETION IN DENYING KAUFMANN'S MOTION FOR CONTINUANCE OF TRIAL DATE, BECAUSE ITS RULING WAS UNREASONABLE UNDER THE PARTICULAR FACTS AND CIRCUMSTANCES OF THIS CASE.

A. The Lower Court Must Act Reasonably in Denying a Motion for Continuance.

Rule 40(b) of the Utah Rules of Civil Procedure provides that "upon motion of a party, the court may in its discretion, and upon such terms as may be just, including the payment of costs occasioned by such postponement, postpone a trial or proceeding upon good cause shown." The rule also provides for the

preservation of witness' testimony subject to the same objections that may be made with respect to depositions if required by the adverse party. Utah R. Civ. P., Rule 40(c).

The granting of a continuance rests in the sound discretion of the trial court, and will not be disturbed on appeal unless the court has abused that discretion by acting unreasonably. Hardy v. Hardy, 776 P.2d 917, 925-26 (Utah App. 1989), citing Christenson v. Jewkes, 761 P.2d 1375, 1377 (Utah 1988), and Miller Pontiac, Inc. v. Osborne, 622 P.2d 800, 803 (Utah 1981). In determining whether to grant a continuance, the trial court should consider the circumstances of each particular case, weighing the rights of the party requesting it against the harm that may result from delay. Butler v. Farner, 704 P.2d 853 (Colo. 1985); 17 Am. Jur. 2d. Continuance §4 (1990). The trial court's legitimate concern for prevention of delay in the trial of cases should not prejudice the substantial rights of a party by forcing him to go to trial without being able to fairly present his case. Yates v. Superior Court In and For the County of Pima, 120 Ariz. 436, 586 P.2d 997 (Ariz. App. 1978); Gonzales v. Harris, 189 Colo. 518, 542 P.2d 842 (1975).

In addition to the above, courts have cited several factors to be considered in deciding whether to grant a continuance. Abuse of discretion may be found, for example, where a party has made timely objections, given necessary notice, and made reasonable efforts to have a trial date reset for good cause. Griffiths v. Hammon, 560 P.2d 1375, 1376 (Utah 1977). Other factors include the length of the delay requested, whether the delay will prejudice the opposing

party, and whether the grant or denial will be in the furtherance of justice. 17 Am. Jur. 2d Continuance §4 (1990).

B. Kaufmann's Due Process Right to an Evidentiary Hearing on the Jurisdictional Issue was Entitled to Considerable Weight in the Balancing Process.

Kaufmann's legal position before trial is another relevant factor to consider in determining whether the lower court acted unreasonably in denying his subsequent motion for continuance, since it raises the level of concern for the adequate protection of his due process right to a judgment based upon the constitutional exercise of territorial jurisdiction. International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945). It is also in accordance with the view that the court should examine the reasonableness of a request for continuance in light of the tradition that a party should be afforded every opportunity to be in attendance at trial. Bairas v. Johnson, 13 Utah 2d 269, 373 P.2d 375 (1962).

In this case, Akhavan's original contention that the district court could exercise personal jurisdiction over Kaufmann under the state's long arm statute, Utah Code Ann. §78-27-24 (1987), rested upon two distinct grounds: (1) maintenance of a residence in Salt Lake County; and (2) causing an injury within the state. (Counterclaim ¶ 4, R. 19). The first ground was subsequently discarded, since none of the claims involved in this case arose from ownership, use, or possession of the property. Thus the remaining justification for assertion of the court's specific personal jurisdiction under the pleadings was the "causing of any

injury within this state whether tortious or by breach of warranty." Utah Code Ann. §78-27-24(3)(1987).

The Utah Supreme Court recently addressed the guidelines to be utilized in analyzing problems of specific personal jurisdiction under the long-arm statute. This analysis requires a two-part inquiry: (1) Whether the proponent's claims arise from one of the activities listed in the statute; and (2) whether the opponent's contacts with the forum are sufficient to satisfy the due process clause of the Fourteenth Amendment to the United States Constitution. Arguello v. Industrial Woodworking Machine Co., 838 P.2d. 1120 (Utah 1992). Before reaching this stage, however, the court must first determine how to proceed when the proponent's jurisdictional allegations are controverted by affidavit, and when jurisdiction turns on the same facts as the merits of the case.

This preliminary problem was squarely raised in Anderson v. Am. Soc. of Plastic and Reconstructive Surgeons, 807 P.2d 825 (Utah 1990). In that case, a patient brought an action against a nonresident sponsor and medical monitor of an experimental facial treatment program. The Third Judicial District Court granted motions to dismiss for lack of personal jurisdiction on the basis of the pleadings and documentary evidence and the patient appealed. On appeal, the Supreme Court vacated the order of dismissal and remanded for trial on the merits with an order to postpone any ruling on personal jurisdiction until after plaintiff had presented her case. Anderson, 807 P.2d at 826.

In reaching this decision, the Court approved the following guidelines for use by the trial court in determining the limits of its territorial jurisdiction:

> 1. If it proceeds on documentary evidence alone (i.e., the first two methods), the plaintiff is only required to make a prima facie showing of personal jurisdiction. The plaintiff's factual allegations are accepted as true unless specifically controverted by the defendant's affidavits or by depositions, but any disputes in the documentary evidence are resolved in the plaintiff's favor. The trial court must not weigh the evidence unless a hearing is held.
>
> 2. Unless an evidentiary hearing is held, the plaintiff must prove jurisdiction at trial by a preponderance of the evidence after making a prima facie showing before trial. When jurisdiction turns on the same facts as the merits of the case, an evidentiary hearing is inappropriate because it infringes on the right to a jury trial and is an inefficient use of judicial resources (hearing the same evidence twice); in such cases--if the plaintiff has made a prima facie showing--jurisdiction is determined by trial on the merits.

Anderson, 807 P.2d at 827.

In Kaufmann, it is clear that Akhavan's jurisdictional claims turn on the same facts as the merits of the case. In fact, they could hardly be otherwise, since his theories of liability turn on the nature and content of certain alleged contacts made by Kaufmann and his alleged agents over the course of several months.

The alternative contract and fraud theories of liability advanced by Akhavan are all based upon his interpretation of Kaufmann's role in a series of meetings, negotiations, and conversations which occurred in Utah, New York, and Switzerland during the latter half of 1989. Kaufmann's defenses turn on the same facts. In short, Kaufmann was either the principal in these

business dealings who utilized agents in Utah to accomplish his aims, (Akhavan), or he was an investment banker only peripherally involved in representing clients holding investments in Republic and therefore interested in Republic's business transactions in Utah and elsewhere. (Kaufmann).

In denying Kaufmann's motion to dismiss, the lower court was advised of the guidelines set forth in Anderson. (R. 576-77). Although it is not altogether clear that the court's order was limited to a determination that Akhavan had only made a prima facie showing of personal jurisdiction and that all disputes in the documentary record were resolved in his favor as required at this stage, the court was nevertheless bound not to weigh the evidence until an evidentiary hearing had been held. Anderson, 807 P.2d at 827.

Since Kaufmann was effectively precluded as a matter of law under Anderson from obtaining an evidentiary hearing on his jurisdictional defenses until trial on the merits, it follows that he was entitled to such a hearing on due process grounds before the court entered its findings against him. Anderson, supra. See also Kamdar & Co. v. LaRay Co., Inc., 815 P.2d 245 (Utah App. 1991). This circumstance should be given considerable weight in assessing the reasonableness of the lower court's action.

C. The Lower Court's Denial of a Continuance was Unreasonable under the Particular Circumstances of this Case.

In this case, the following facts support the trial court's ruling:

1. Kaufmann was represented by competent counsel since November, 1990, and was aware of the July 7, 1992 trial date. (R. 1036).

2. The case was originally set for trial in March, 1992, but was continued because of a scheduling conflict on the part of Kaufmann's counsel. (R. 898; 1043).

3. Kaufmann's counsel filed a notice and motion for leave to withdraw as counsel on June 17, 1992, just three weeks prior to the second date set for trial. (R. 959-65; 1043).

4. The motion to withdraw was based on the grounds that Kaufmann was either unable or unwilling to pay the legal fees due and owing his trial counsel. (R. 960).

5. In his motion to withdraw, Kaufmann's counsel represented to the court that Kaufmann did not intend to have substitute counsel enter an appearance and that the motion "is not filed with the intent of seeking a delay of trial." (R. 961).

6. At the pretrial conference held on June 29, 1992, the court required confirmation from Kaufmann that he did not intend to appear. (R. 1028).

7. In response, Kaufmann personally advised the court by FAX on July 1, 1992, that he was not prepared to go to trial until September or October, 1992, for financial reasons, and because he needed additional time to obtain new Utah counsel. (R. 1014; 1016).

8. Akhavan's counsel objected to the proposed continuance on the grounds that his client should not be burdened by a second delay. (R. 1000).

By contrast, the facts supporting Kaufmann's motion include the following:

1. Kaufmann is a foreign, nonresident residing in Zürich, Switzerland who consistently challenged the court's assertion of specific personal jurisdiction over him. (R. 49; 235; 517; 525-27; 545-55; 638).

2. Although Kaufmann had been represented by competent counsel since November, 1990, his counsel moved to withdraw just three weeks before the case was scheduled for trial. (R. 959-65)

3. Prior to the motion to withdraw, Kaufmann's local counsel relocated her practice to Phoenix, Arizona, thereby leaving Kaufmann without benefit of any "local" counsel in Utah. (R. 931). The record does not indicate that she took any further steps to protect his interests.

4. The first motion for continuance was filed by Kaufmann's Washington D.C. counsel because of a conflict in his trial schedule, not at Kaufmann's insistence. (R. 898). The assertion by Akhavan's counsel that "obviously Bloom was not being paid at that time" (R. 1000-1001) was presumption on his part rather than evidence and should be disregarded.

5. Kaufmann's own response to the court indicated that he strongly denied the allegations and was prepared to go to trial in

September/October of 1992, at most, a two to three month delay. (R. 1016).

6. Kaufmann requested additional time in order to obtain new counsel in Utah to defend his interests at trial. (R. 1016).

7. The record clearly indicates that the attorney-client relationship between Kaufmann and his Washington D.C. counsel had so completely broken down in terms of trust and communication by July 1, 1992, that his counsel believed himself to be placed in a conflict of interest situation with his own client. (R. 1015; 1028-29).

8. Kaufmann advised his new Utah counsel that:

> "(a) he believes he has substantial and meritorious defenses to all of the claims of the counterclaimant;
>
> (b) he genuinely desires to defend this action and is willing to appear at trial;
>
> (c) he will take all necessary action to assist in the preparation of the matter for trial and appear at trial;
>
> (d) he would like me to represent him and will make adequate financial arrangements with me to represent him in this matter, and
>
> (e) he and his present attorney have had serious and substantial disagreements to the degree that he believes that he cannot be adequately represented." (R. 987-88).

9. Based upon his limited review of the pleadings and his conversations with Kaufmann, his new Utah counsel concluded and represented by affidavit that "new counsel for Mr. Kaufmann cannot

adequately be prepared for trial on July 7, 1992, based upon its complexity and the detailed factual history associated with the claims which are the subject of this action." (R. 988).

10. By contrast, Akhavan failed to demonstrate any specific prejudice to his position occasioned by a two/three month delay beyond being "burdened by these tactics to delay the trial again." (R. 1000). It should be noted that this assertion by Akhavan's counsel rather surprisingly assumes without any proof that the first motion for continuance was a sham to delay the trial. (R. 919-22). It should be noted further that the combined maximum additional time requested in both motions for continuance taken together would have extended the trial date from March 1992 to October 1992, a time period of seven months.

In balancing the opposing interests on this issue, appellant submits that it was unreasonable for the lower court to deny the motion when it became apparent that Kaufmann could not be adequately represented at trial on July 7, 1992, and that his substantial rights to contest and defend both jurisdictional and liability issues would be severely prejudiced by the court's decision. It must be remembered that Kaufmann was trying to resolve these problems at a great distance, within the context of a different legal system, and without benefit of local counsel. By contrast, Akhavan was a resident of Salt Lake County, had benefit of local counsel, and failed to demonstrate any specific prejudice beyond the burden of waiting an additional two to three months to go to trial.

Under Rule 40(c) of the Utah Rules of Civil Procedure, the lower court could have granted the motion and still preserved the testimony of Akhavan and his witnesses at Akhavan's request. The court could also have required Kaufmann to pay the costs occasioned by such postponement under Rule 40(b). None of these steps which could have mitigated any prejudice to Akhavan was taken.

Kaufmann demonstrated good cause for his requested continuance. In view of his due process right to an evidentiary hearing on the jurisdictional question coupled with application of the legal principle that the court should examine a request for continuance in light of the tradition that a party should be afforded every opportunity to appear and defend at trial, the lower court acted unreasonably in denying the motion.

II.

THE LOWER COURT ABUSED ITS DISCRETION BY ENTERING DEFAULT JUDGMENT AGAINST KAUFMANN, BECAUSE ITS RULING WAS UNREASONABLE UNDER THE PARTICULAR FACTS AND CIRCUMSTANCES OF THIS CASE.

In his motion for entry of default judgment against Kaufmann which was served on July 1, 1992, Akhavan justified such action on Kaufmann's failure to personally appear at the pretrial conference on June 29 coupled with the statement of his withdrawing counsel that Kaufmann was not going to retain new counsel or appear at trial. (R. 1004; 1009). As noted above, Kaufmann was in the process of obtaining new Utah counsel and seeking a continuance of trial date (R. 1037). Akhavan argued that Kaufmann should be

sanctioned under Rule 37(b)(2)(B), (C), and (D) of the Utah Rules of Civil Procedure for failure to appear as provided in Rule 16(d). (R. 1004). Although at the pretrial conference, Kaufmann's counsel apparently was informed that if Kaufmann failed to appear at trial a default judgment would be entered against him, no pretrial order to that effect appears in the record. (R. 1036).

In opposing the motion, Kaufmann's Washington D.C. counsel argued that although Kaufmann had been absent from the pretrial conference because of the distance involved, he was represented by counsel in spite of the fact that counsel had filed a motion to withdraw. (R. 1019). He then relayed Kaufmann's request for a continuance noting the communication and conflict of interest problems between himself and his client. (R. 1019-20).

Although in entering its default order and judgment the court made no reference to Rule 16(d) or Rule 37(b)(2) in terms of sanctions, the order clearly was of that nature since it was based upon prior (oral) rulings "that if Kaufmann and his counsel failed to appear for trial, a default judgment would be entered." (R. 1051). Kaufmann and his counsel were aware of these rulings prior to trial. (R. 1036-37).

Because of the close connection between Kaufmann's motion for continuance and Akhavan's motion for entry of default judgment, the same factors considered above in balancing the competing interests of the parties are relevant here. In addition, however, this court has observed that a default judgment is an unusually harsh remedy that should be meted out with caution. Darrington v. Wade, 812

P.2d 452 (Utah App. 1991). See also, Griffiths v. Hammon, 560 P.2d 1375 (Utah 1977); Utah Sand & Gravel Products Corp. v. Tolbert, 402 P.2d 703 (Utah 1965); Warner v. Dixon Ranch Co., 260 P.2d 741 (Utah 1953).

In this case, the record indicates that the attorney-client relationship between Kaufmann and his Washington D.C. counsel had deteriorated to the point that he believed he could not be adequately represented; that he sought to retain new Utah counsel who immediately moved for a continuance of trial date; that he believes that he has substantial and genuine defenses to Akhavan's claims; and that he genuinely desires to defend this action and will take all necessary steps to appear at trial. (R. 987-88). He also attempted to explain to the court by letter dispatched from his home in Switzerland that he was unable to attend trial on July 7, 1992, because of financial difficulties. (R. 1037).

In short, this is simply not a case of "willfulness, bad faith, or fault" which justifies entry of default judgment as a sanction against a noncomplying party. See, Amica Mut. Ins. Co., v. Schettler, 768 P.2d 950 (Utah App. 1989). On the contrary, the record demonstrates that Kaufmann immediately responded to the court's pretrial ruling of June 29, 1992, by retaining new counsel and moving for a continuance three days later. (R. 979; 1036-37). In addition, he attempted without benefit of counsel to demonstrate his inability to appear on July 7, 1992, for financial reasons. (R. 1037). It should also be noted that the court did not rule on Kaufmann's motion for continuance until July 6, 1992, approximately

twenty-four hours prior to trial, despite his motion for an expedited hearing. (R. 983; 1043).

As indicated above, the reasonableness of the court's ruling in this case must be viewed from the factual and legal context in which it occurred. Kaufmann was a foreign, nonresident defendant living thousands of miles from the forum who had effectively lost the adequate representation of his out-of-state counsel just prior to trial. He had previously challenged the court's personal jurisdiction over him and was entitled under Utah law to an evidentiary hearing on the issue. He took immediate steps to secure new Utah counsel and move for a continuance once he had been advised of the court's pretrial rulings. He was prejudiced by entry of default judgment in that he was deprived of a full and fair opportunity to present his case in court.

III.

THE LOWER COURT ERRED IN FINDING THAT KAUFMANN VOLUNTARILY SUBMITTED TO THE COURT'S JURISDICTION IN THIS CASE, SINCE THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT SUCH A FINDING.

After conducting a hearing in Kaufmann's absence, the lower court entered the following Finding of Fact No. 1 and Conclusion of Law No. 1 on the jurisdictional issue:

FINDING OF FACT NO. 1

"Kaufmann was properly served with process in this action and by Stipulation agreed and submitted to this court's jurisdiction over him. Since November of 1990, Kaufmann has been represented by

competent counsel from the law firm of Metzer, Gordon, Scully & Mortimer and Leslie Ann Haacke, as local counsel."

CONCLUSION OF LAW NO. 1

"Kaufmann was properly served with process in this action and by Stipulation agreed and submitted to this court's jurisdiction over him. Since November of 1990, Kaufmann has been represented by competent counsel from the law firm of Metzger, Gordon, Scully & Mortimer and Leslieann Haacke, as local counsel."

In attempting to marshall the evidence in favor of the court's finding on this issue, counsel for appellant has been unable to locate a single fact supporting it in the record or transcript of hearing. The only possibility is a stipulation entered into early in the case in which Akhavan agreed to the entry of an order vacating a default certificate filed against Kaufmann before he was represented by counsel in exchange for Kaufmann's agreement to waive his objections to certain defects in Akhavan's attempted service of process. (R. 543). But this stipulation expressly states that Kaufmann has not waived any of his jurisdictional defenses. (R. 543). In fact Kaufmann continued to raise those defenses below until default judgment was entered against him. (R. 49; 235; 517; 525-27; 545-55; 638). All of the other stipulations deal with routine extensions of time or continuances of hearings without mention of any jurisdictional waiver. (R. 659).

Findings of fact are clearly erroneous if it can be shown that they lack adequate evidentiary foundation. Western Capital & Secs., Inc. v. Knudsvig, 768 P.2d 989 (Utah App.), cert. denied,

779 P.2d 688 (Utah 1989). Conclusions of law are reviewed under a correctness of error standard. Bailey v. Call, 767 P.2d 138 (Utah App.), cert. denied, 773 P.2d 45 (Utah 1989).

Since the strongest case of inadequate or insufficient evidence is no evidence at all, this finding and conclusion are both clearly erroneous and clearly wrong.

Kaufmann has been prejudiced by this finding and conclusion since they are unsupported by any evidence whatever and purport to justify the court's assertion of general personal jurisdiction over him in a way which would preclude subsequent collateral attack. Such a result is both contrary to law and fundamental fairness and should be reversed on this appeal.

IV.

THE LOWER COURT ERRED IN AWARDING CONSEQUENTIAL DAMAGES IN THIS CASE, SINCE IT AFFORDED AKHAVAN A DOUBLE RECOVERY.

In Utah, recoverable damages for breach of contract include both general or compensatory damages, i.e., those flowing naturally from the breach, and consequential damages, i.e., those reasonably within the contemplation of or reasonably foreseeable by the parties at the time the contract was made. Beck v. Farmers Ins. Exch., 701 P.2d 795 (Utah 1985); Pacific Coast Title Ins. Co. v. Hartford Accident & Indemnity Co., 7 Utah 2d 377, 379, 325 P.2d 906, 907 (1958), citing Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Rep. 145 (1854). Recoverable damages for fraud are based upon the "benefit of the bargain" rule. Lamb v. Bangart, 525 P.2d 602, 607

(Utah 1974). In either event, the trial court's award of damages will be affirmed on appeal if there is a "reasonable basis in evidence" to support it. Katzenberger v. State, 735 P.2d 405 (Utah App. 1987), citing Holman v. Sorenson, 556 P.2d 499, 500 (Utah 1976).

In this case, the lower court specifically found that the terms of the contract included the following:

a. Purchase price of $300,000 for Akhavan's equity interest in General Display;

b. A covenant by Akhavan not to compete for a period of two years;

c. An agreement to pay Akhavan 25% of the net proceeds from any judgment or settlement of a pending lawsuit against the Walt Disney Company; and

d. Attorney's fees payable to the prevailing party in litigation. (Finding of Fact No. 9, R. 1045).

Following the hearing, the court found that Akhavan was entitled to recover damages as follows:

a. $250,000 for the difference between the contract price and current value of General Display. (Since $50,000 had already been paid, the total amount recovered equaled the contract price of $300,000.);

b. $168,000 under the covenant not to compete for 2 years;

c. $43,250 which was 25% of the $173,000 settlement of the Walt Disney suit;

d. $44,212.50 for attorney's fees and $3,006.59 for costs of suit. (Finding of Fact No. 17, R. 1047).

The court's related Conclusion of Law on damages reads as follows:

"Kaufmann, in connection with negotiations for executing the contract with Akhavan, made certain representations to Akhavan which Kaufmann knew to be false and upon which Akhavan relied upon entering into the contract with Kaufmann. Kaufmann's breaches and misrepresentations have caused Akhavan to suffer damages in the amount set forth in Exhibit 3. Akhavan is entitled to judgment against Kaufmann in the amount of $553,563.53 and costs of $3,006.59. (Conclusion of Law No. 7, R. 1048).

Although it is not altogether clear from the court's Conclusion of Law No. 7 whether damages are being awarded for breach of contract, fraud, or both together, Kaufmann submits that the award was contrary to law in all events, since it permitted Akhavan to reap a double recovery.

Even though recovery for breach of contract may include both compensatory and consequential damages, and may provide plaintiff the full benefit of the bargain in fraud, a party's damages are nevertheless limited in either case by the rule which prohibits a double recovery. In contract cases, for example, it is well settled that an obligee is entitled to be paid in full but cannot exact double recovery. Cook Assoc., Inc. v. Warnick, 664 P.2d 1161 (Utah 1983), citing Brigham City Sand & Gravel v. Machinery Center, Inc., 613 P.2d 510, 511-12 (Utah 1980). In fraud cases, a double

recovery is contrary to the benefit of the bargain rule. Brown v. Richards, 840 P.2d 143 (Utah App. 1992).

In this case, Kaufmann submits that the agreed upon price for the business necessarily included the value of Akhavan's covenant not to compete, since it was not valued separately as was the 25% interest in the Disney suit. (Agreement, Addendum F, R. 287-90). See also, Rudd v. Parks, 588 P.2d 709 (Utah 1978) (awarding damages for a covenant not to compete which was separately valued as part of the total purchase price). Had Akhavan elected to violate the covenant, he would have been liable for damages which properly would have been treated as an offset against the amount owing for the purchase price. In short, had Akhavan been paid the full purchase price of $300,000, he would have had no action for breach of contract or fraud, and would have received the full benefit of the bargain. By allowing him to recover the full amount of the purchase price in compensatory damages, plus the alleged value of his covenant not to compete, the court permitted him to exact a double recovery in contravention of law.

CONCLUSION

Roland Kaufmann was denied a full and fair opportunity to appear and defend at trial by the court's adverse rulings in this case. He was prejudiced at the entry of default judgment against him based upon a jurisdictional finding which lacks any basis whatsoever in the evidence. He was further prejudiced by an excessive award of damages which is contrary to law. For these and

the foregoing reasons, the judgment of the lower court should be reversed and the case remanded for trial.

DATED this 3rd day of March, 1993.

Respectfully submitted,

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CERTIFICATE OF MAILING

I certify that I caused two true and correct copies of the foregoing Brief of Appellant to be mailed, first-class postage prepaid, to the following this 3rd day of March, 1993:

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APPENDIX

Tab A

AMENDMENT XIV

Section 1. [Citizenship — Due process of law — Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tab B

78-27-24. Jurisdiction over nonresidents — Acts submitting person to jurisdiction.

Any person, notwithstanding Section 16-10-102, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:

(1) the transaction of any business within this state;

(2) contracting to supply services or goods in this state;

(3) the causing of any injury within this state whether tortious or by breach of warranty;

(4) the ownership, use, or possession of any real estate situated in this state;

(5) contracting to insure any person, property, or risk located within this state at the time of contracting;

(6) with respect to actions of divorce, separate maintenance, or child support, having resided, in the marital relationship, within this state notwithstanding subsequent departure from the state; or the commission in this state of the act giving rise to the claim, so long as that act is not a mere omission, failure to act, or occurrence over which the defendent had no control; or

(7) the commission of sexual intercourse within this state which gives rise to a paternity suit under Title 78, Chapter 45a, to determine paternity for the purpose of establishing responsibility for child support.

History: L. 1969, ch. 246, § 3; 1983, ch. 160, § 1; 1987, ch. 35, § 1.

Tab C

Hales, 656 P.2d 423 (Utah 1982); Alpine Credit Union v. Moeller, 656 P.2d 988 (Utah 1982); Hal Taylor Assocs. v. Unionamerica, Inc., 657 P.2d 743 (Utah 1982); Rosenlof v. Sullivan, 676 P.2d 372 (Utah 1983); Bushnell Real Estate, Inc. v. Nielson, 672 P.2d 746 (Utah 1983); Call v. City of West Jordan, 727 P.2d 180 (Utah 1986); Ebbert v. Ebbert, 744 P.2d 1019 (Utah Ct. App. 1987); Newmeyer v. Newmeyer, 745 P.2d 1276 (Utah 1987); Tripp v. Vaughn, 746 P.2d 794 (Utah Ct. App. 1987); Oates v. Chavez, 749 P.2d 658 (Utah 1988); Galloway v. Afco Dev. Corp., 777 P.2d 506 (Utah Ct. App. 1989); Redevelopment Agency v. Daskalas, 785 P.2d 1112 (Utah Ct. App. 1989); Wanlass v. D Land Title, 790 P.2d 568 (Utah Ct. App. 1990); Estate of Wolfinger v. Wolfinger, 793 P.2d 393 (Utah Ct. App. 1990); Sneddon v. Graham, 175 Utah Adv. Rep. 13 (Ct. App. 1991).

COLLATERAL REFERENCES

Am. Jur. 2d. — 61A Am. Jur. 2d Pleading §§ 289 to 295, 306 et seq., 329 to 331.

C.J.S. — 71 C.J.S. Pleading §§ 275 to 338.

A.L.R. — Right to amend pending personal injury action by including action for wrongful death after statute of limitations has run against independent death action, 71 A.L.R.3d 933.

Amendment of pleading after limitation has run, so as to set up subsequent appointment as executor or administrator of plaintiff who professed to bring the action in that capacity without previous valid appointment, 27 A.L.R.4th 198.

Amendment of pleading to add, substitute, or change capacity of, party plaintiff as relating back to date of original pleading, under Rule 15(c) of Federal Rules of Civil Procedure, so as to avoid bar of limitations, 12 A.L.R. Fed. 233.

What constitutes "prejudice" to party who objects to evidence outside issues made by pleadings so as to preclude amendment of pleadings under Rule 15(b) of Federal Rules of Civil Procedure, 20 A.L.R. Fed. 448.

Construction and application of Rule 15(d) of Federal Rules of Civil Procedure providing for allowance of supplemental pleadings setting forth transactions, occurrences, or events subsequent to original pleading, 28 A.L.R. Fed. 129.

Rule 15(c), Federal Rules of Civil Procedure, or state law as governing relation back of amended pleading, 100 A.L.R. Fed. 880.

Key Numbers. — Pleading ⇐ 229 to 286.

Rule 16. Pretrial conferences, scheduling, and management conferences.

(a) **Pretrial conferences.** In any action, the court in its discretion or upon motion of a party, may direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as:

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted for lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation;

(5) facilitating the settlement of the case; and

(6) considering other matters as may aid in the orderly disposition of the case.

(b) **Scheduling and management conferences.** In any action, in addition to any pretrial conferences that may be scheduled, the court in its discretion may direct that a scheduling or management conference be held. The court may direct the attorneys or unrepresented parties to appear before the court. Scheduling or management conferences may also be held by way of telephone conferencing between the court and counsel as the particular case may require. Decisions and agreements reached at scheduling and management conferences may be formally made an order of the court. At the conference, the court may consider the following matters:

(1) the formation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or advisability of joining additional parties or amendment of pleadings;

(3) the completion of outstanding discovery;

(4) the time for filing and hearing of motions;

(5) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on admissibility of evidence;

(6) the identification of witnesses and documents, the need for and schedule for filing and exchanging trial briefs, and the dates for a final pretrial and scheduling conference and for a trial;

(7) the advisability of referring matters to a lower court that has appropriate jurisdiction to hear the case;

(8) the possibility of settlement;

(9) the need for adopting special procedures for managing particularly difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(10) the form and substance of a pretrial order, if it is determined that a formal pretrial order is necessary in the particular case; and

(11) such other matters as may aid in the disposition of the case.

(c) **Final pretrial or settlement conferences.** In any action where a final pretrial conference has been ordered, it shall be held as close to the time of trial as reasonable under the circumstances. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties, and the attorneys attending the pretrial, unless waived by the court, shall have available, either in person or by telephone, the appropriate parties who have authority to make binding decisions regarding settlement.

(d) **Sanctions.** If a party or a party's attorney fails to obey a scheduling or pretrial order, if no appearance is made on behalf of a party at a scheduling or pretrial conference, if a party or a party's attorney is substantially unprepared to participate in the conference, or if a party or a party's attorney fails to participate in good faith, the court, upon motion or its own initiative, may make such orders with regard thereto as are just, and among others, any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanctions, the court shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney fees, unless the court finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

(Amended effective Jan. 1, 1987.)

NOTES TO DECISIONS

ANALYSIS

Tab D

their authenticity, to accept a copy of defendant's written admissions served upon plaintiff as compliance with the rules; where the trial court chose the latter option, it was proper to permit plaintiff to recite defendant's admissions into the record. Triple I Supply, Inc. v. Sunset Rail, Inc., 652 P.2d 1298 (Utah 1982).

—Failure to respond.

——Objectionable matter.

Even if a request for an admission is objectionable, if a party fails to object and fails to respond to the request, then that party should be held to have admitted the matter. Jensen v. Pioneer Dodge Ctr., Inc., 702 P.2d 98 (Utah 1985).

——Prison inmate.

When inmate served requests for admissions and interrogatories on prison officials in action for recovery of value of personal property taken from him, on failure of officials to respond to the requests, apply for extension of time, or move to amend or withdraw their admissions pursuant to Subdivision (b), all the facts were deemed admitted and the inmate was entitled to judgment against the officials. Schmitt v. Billings, 600 P.2d 516 (Utah 1979).

—Motion to dismiss.

——Tolling.

Filing a motion to dismiss did not toll effect of Subdivision (a), which treats requests for admissions which are not answered within 45 days as if admitted and as a proper basis for summary judgment. Schmitt v. Billings, 600 P.2d 516 (Utah 1979).

—Punitive damages.

Where plaintiff requests an admission of punitive damages in an amount unrelated to actual damages, the court, as a matter of equity, must intervene and examine the admission. Jensen v. Pioneer Dodge Ctr., Inc., 702 P.2d 98 (Utah 1985).

Cited in Utah Sand & Gravel Prods. Corp. v. Salt Lake County Comm'n, 14 Utah 2d 151, 379 P.2d 379 (1963); W.W. & W.B. Gardner, Inc. v. Park West Village, Inc., 568 P.2d 734 (Utah 1977).

COLLATERAL REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d Depositions and Discovery §§ 314 to 325.

C.J.S. — 27 C.J.S. Discovery §§ 88 to 110.

A.L.R. — Continuance sought to secure testimony of absent witness in civil case, admissions to prevent, 15 A.L.R.3d 1272.

Party's duty, under Federal Rule of Civil Procedure 36(a) and similar state statutes and rules, to respond to request for admission of facts not within his personal knowledge, 20 A.L.R.3d 756.

Formal sufficiency of response to request for admissions under state discovery rules, 8 A.L.R.4th 728.

Permissible scope, respecting nature of inquiry, of demand for admissions under modern state civil rules of procedure, 42 A.L.R.4th 489.

Key Numbers. — Discovery ⇐ 121 to 129.

Rule 37. Failure to make or cooperate in discovery; sanctions.

(a) **Motion for order compelling discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) **Appropriate court.** An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) **Motion.** If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance

with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) **Evasive or incomplete answer.** For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) **Award of expenses of motion.** If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) **Failure to comply with order.**

(1) **Sanctions by court in district where deposition is taken.** If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) **Sanctions by court in which action is pending.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) an order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in Paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) **Expenses on failure to admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) **Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under Paragraphs (A), (B), and (C) of Subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) **Failure to participate in the framing of a discovery plan.** If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure. (Amended effective Jan. 1, 1987.)

Compiler's Notes. — This rule corresponds to Rule 37, F.R.C.P.

Cross-References. — Contempt generally, § 78-32-1 et seq.

Tab E

a jury trial was made, or that any objection or exception was made at any time during trial against right of the court to try the case without a jury, it would be presumed on appeal that a trial by jury was waived Perego v Dodge, 9 Utah 3, 33 P 221 (1893), aff'd, 163 U S 160, 16 S Ct 971, 41 L Ed 113 (1896)

Trial by jury.

—Grant of jury trial.

——Absence of demand.

Court did not abuse its discretion in granting jury trial to defendant, under this rule, over plaintiff's objections although defendant had not made proper demand for jury trial under Rule 38, where plaintiff was not prejudiced thereby James Mfg Co v Wilson, 15 Utah 2d 210, 390 P 2d 127 (1964)

—Right.

——Quiet title action.

This rule gives the right to have any legal issue of fact tried by a jury upon proper demand, and plaintiff in an action to quiet title to mining claims was entitled to a jury trial on issues of fact Holland v Wilson, 8 Utah 2d 11, 327 P 2d 250 (1958)

Cited in Randall v Tracy Collins Trust Co, 6 Utah 2d 18, 305 P 2d 480 (1956)

COLLATERAL REFERENCES

Am. Jur. 2d — 47 Am Jur 2d Jury §§ 57, 58, 75A Am Jur 2d Trial § 714 et seq

C.J.S. — 50 C J S Juries §§ 98 to 105, 88 C J S Trial §§ 20, 203, 547 et seq

A.L.R. — When does jeopardy attach in a non-jury trial, 49 A L R 3d 1039

Discretion of district court under Rule 39(b) of Federal Rules of Civil Procedure, authorizing it to order jury trial notwithstanding party's failure to make seasonable demand for jury, 6 A L R Fed 217

Key Numbers. — Jury ⇐ 25, Trial ⇐ 10, 134, 367 et seq

Rule 40. Assignment of cases for trial; continuance.

(a) **Order and precedence.** The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts may deem expedient Precedence shall be given to actions entitled thereto by statute

(b) **Postponement of the trial.** Upon motion of a party, the court may in its discretion, and upon such terms as may be just, including the payment of costs occasioned by such postponement, postpone a trial or proceeding upon good cause shown If the motion is made upon the ground of the absence of evidence, such motion shall also set forth the materiality of the evidence expected to be obtained and shall show that due diligence has been used to procure it The court may also require the party seeking the continuance to state, upon affidavit or under oath, the evidence he expects to obtain, and if the adverse party thereupon admits that such evidence would be given, and that it may be considered as actually given on the trial, or offered and excluded as improper, the trial shall not be postponed upon that ground

(c) **Taking testimony of witnesses present.** If required by the adverse party, the court shall, as a condition to such postponement, proceed to have the testimony of any witness present taken, in the same manner as if at the trial, and the testimony so taken may be read on the trial with the same effect, and subject to the same objections that may be made with respect to a deposition under the provisions of Rule 32(c)(1) and (2) [Rule 32 (c)(3)(A) and (B)].

Compiler's Notes. — Following the amendment of Rule 32, effective January 1, 1987, the reference to Rule 32(c)(1) and (2), at the end of Subdivision (c), should now be to Rule 32(c)(3)(A) and (B)

Subdivision (a) of this rule is similar to Rule 40, F R C P

Cross-References. — Amendment of pleadings to conform to evidence, continuance upon, Rule 15(b)

Tab F

ROBERT D. RADCLIFFE
ATTORNEY AT LAW

6985 UNION PARK CENTER
SUITE 535
MIDVALE, UTAH 84047

TELEPHONE 801/521-5000
TELEFAX 801/359-2830
Member of the California Bar
Not admitted in the State of Utah

October 19, 1989

Sia Akhavan
643 17th Avenue
Salt Lake City, Utah 84103

RE: Memorandum of Oral Agreement by and Between Robert D. Radcliffe and Sia Akhavan RE: General Display Corporation

Dear Sia:

This letter constitutes a written memorandum of oral agreement by and between Robert D. Radcliffe (herein "RADCLIFFE"), the undersigned, and Mr. Sia Akhavan (herein "AKHAVAN") concerning RADCLIFFE's purchase of AKHAVAN's ownership interest in General Display Corporation (hereinafter "GDC"), which may or may not include shares of common stock. The agreement contains the following terms and conditions:

1. SALE AND PURCHASE OF STOCK OR OTHER INTERESTS. RADCLIFFE hereby agrees to purchase from AKHAVAN all of AKHAVAN's shares of common stock, or all of his right, title and interest in and to GDC which, at closing, shall constitute 50% equity interest in said company.

2. PURCHASE PRICE. The Purchase Price for said shares of stock or equity interest shall total Three Hundred Thousand Dollars ($300,000).

3. ADDITIONAL PURCHASE BONUS: In the event the net earnings of GDC equal or exceed ten percent (10%) of invested capital at the end of twenty-four (24) months after close of escrow, then AKHAVAN shall be paid an additional purchase bonus of Two Hundred Thousand Dollars ($200,000) payable in cash. "Net Earnings" and "invested capital" shall be defined and the amount determined by GDC auditors and shall apply to the latest twelve (12) month reporting period covered by the normal company audit reporting period.

4. PAYMENT OF PURCHASE PRICE. The Purchase Price shall be paid by the sum of Fifty Thousand Dollars ($50,000) at the closing of the purchase transaction, and a secured promissory note in the amount of Two Hundred Fifty Thousand Dollars ($250,000) payable in eighteen (18) equal monthly installments of principal, plus accrued interest on the unpaid balance at the rate of 10% per annum. The first payment shall commence 60 days from the close of escrow.

0287

EXHIBIT F

5. SECURITY FOR PROMISSORY NOTE. As security for the payment of the Promissory Note described above, RADCLIFFE agrees to pledge Five Hundred Thousand Dollars ($500,000) worth of issued and outstanding Republic International Corporation stock owned by RADCLIFFE with its value being determined by the stocks' price on the over-the-counter market on the date of closing. Every six months following execution of the definite agreement contemplated herein, and until the Promissory Note is fully paid, the value of RADCLIFFE's stock shall be reassessed, and should its value decline, sufficient numbers of shares shall be deposited with the escrow agent to cure said deficiency, PROVIDED, HOWEVER, RADCLIFFE shall not be required to maintain the value of the pledged stock hereunder in excess of double the then outstanding balance of the Promissory Note.

6. ESCROW FOR PLEDGED SECURITIES. The definitive agreement contemplated herein shall establish an escrow at the law offices of Kruse, Landa & Maycock, c/o Jim Kruse, Eighth Floor, Valley Tower, 50 West Broadway, Salt Lake City, Utah, 84101, upon terms and conditions established by Kruse, Landa & Maycock and mutually approved by RADCLIFFE and AKHAVAN.

7. REPRESENTATIONS AND WARRANTIES BY AKHAVAN. AKHAVAN represents and warrants to RADCLIFFE as follows:

a. That he owns the subject interests to be purchased hereunder and that they are not encumbered in any manner.

b. That GDC is a corporation in good standing under the laws of the State of Utah and that he has the requisite authority thereunder to sell the shares to RADCLIFFE.

c. ~~That~~ all financial statements and ~~similar representations~~ made to RADCLIFFE ~~previously or to any~~ third party have been prepared by GDC under ~~AKHAVAN's supervision~~ as president and, to the ~~best of his~~ knowledge, they are true and correct.

d. ~~That, to the best~~ of his knowledge, while acting ~~as president of~~ GDC, he caused all tax returns~~, both federal~~ and state, to have been ~~filed by GDC~~.

e. That he has or will disclose to RADCLIFFE all contracts, leases, agreements, joint ventures, licenses, financing arrangements, permits, and any other binding arrangement known to him which would have a material effect on this transaction and the operation of GDC.

f. That to the best of his knowledge GDC has good and marketable title to all of its property, ~~free and clear of all liens, mortgages, pledges, encumbrances, proprietary interests, and/or charges of all~~

kinds including, but not limited to all technology related to the business of GDC and currently contemplated by GDC, patents, inventions, trade secrets, know-how and confidential information of any kind related to the business of GDC. Furthermore, that all such proprietary and intangible rights have been secured by GDC by appropriate protective measures and that there are no known disclosures or publications of said information to third parties. *Moreover, that there are no known claims by third parties,* including employees or agents, for any equitable interest in said proprietary rights.

g. That, to the best of his knowledge, there are no actions, suits, proceedings, arbitrations or litigation of any kind pending or threatened against GDC or its business or assets except for that certain lawsuit entitled General Display Corporation v. The Walt Disney Company, Civil No. 89-C-892-J, presently pending in the *United States District Court for the District of Utah.* AKHAVAN specifically warrants and represents that this particular lawsuit is an asset of GDC and that he has no interest in it whatsoever. In the event GDC prosecutes this claim, GDC shall pay AKHAVAN twenty-five percent (25%) of the net proceeds after all costs of litigation, including attorneys' fees, from settlement or judgment.

8. CLOSING PROCEDURES. The closing of this transaction is therefore contemplated to take place on Friday, October 20, 1989, at the offices of ROBERT D. RADCLIFFE, *6985 Union Park Center, Suite 535, Midvale,* Utah, or at such other date and time as may be mutually agreeable in writing between the parties hereto.

9. INDEMNIFICATION. Immediately upon the close of this transaction, RADCLIFFE shall convene a shareholders' meeting and vote his shares to approve the indemnification of AKHAVAN by the corporation from and against any debts and obligations of the corporation which have been disclosed to RADCLIFFE. This contemplated indemnification shall include any GDC obligations as to equipment, real property, loans, notes, accounts payable and specifically the presently pending assessment for unpaid withholding taxes asserted by the Internal Revenue Service.

10. COVENANT NOT TO COMPETE. Subsequent to the consummation of this transaction and the termination of AKHAVAN's employment by GDC, whichever occurs first, AKHAVAN agrees not to establish without prior written approval any firm or corporation, or enter into any employment, or to provide any services whatsoever to third parties which would be competitive in any manner with the business of GDC, including but not limited to, soliciting any business whatsoever from GDC's existing customers as set forth in Exhibit A hereto. This covenant not to compete shall terminate two years after the close of escrow hereunder. This covenant not to compete shall have no territorial limits with regard to the persons or entities disclosed on Exhibit A, however shall be limited to the states of Utah, Arizona, Nevada, California,

Oregon, Washington, Idaho, Montana and Colorado as to all other persons or entities.

11. DISPUTES. Any dispute which might arise under the terms of this agreement shall be resolved under the laws of the State of Utah and any lawsuit arising out of this agreement shall be instituted in a state or federal court in the State of Utah. The prevailing party in any such suit shall be entitled to an award of attorney's fees.

12. ASSIGNMENT. RADCLIFFE may assign his rights and obligations under this agreement with the prior written approval of AKHAVAN. Reasonable approval shall not be withheld so long as AKHAVAN retains the security set forth in paragraph 4 herein.

13. INVESTMENT REPRESENTATION. RADCLIFFE understands that the shares of GDC stock have not been registered and that they are being offered for sale pursuant to an exemption from registration under the Securities Act of 1933; that there is no assurance that the exemption is available; that the shares will be subject to statutory restrictions on resale; and that the shares will be delivered with restrictive provisions imprinted thereon.

RADCLIFFE represents that he has such knowledge and experience in financial and business matters that he has made an informed investment decision and that he is purchasing this investment as an investment without the present intent to dispose of it by resale other than as represented in paragraph 12 herein. In the event RADCLIFFE assigns his right to purchase to another person or entity pursuant to paragraph 12, then said party shall execute this paragraph upon transfer.

Please sign in the space provided below indicating your acceptance.

BY: _____
Robert D. Radcliffe

AGREED AND ACCEPTED THIS 21st day of Oct, 1989.

BY: _____
Sia Akhavan

Tab G

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF

THE STATE OF UTAH, COUNTY OF SALT LAKE

CERTIFIED COPY

ROBERT D. RADCLIFFE
Plaintiff,

vs.

SIA AKHAVAN, JOEL M. LASALLE ET. AL.
Defendants.

Case No. 900900439
920541-CA

Supplemental transcript of proceedings

Proceedings before the Honorable
Judge James S. Sawaya
On July 7, 1992

Cathy Gallegos
Certified Shorthand Reporter
License No. 177
2901 West Bedford Rd.
West Valley City, Utah 84119

July 7, 1992

MR. HOLBROOK: First witness we would call would be Sia Akhavan.

THE COURT: Come forward and be sworn.

SIA AHKAVAN

Called as a witness, having been first duly sworn was examined and testified as follows:

EXAMINATION

BY MR. HOLBROOK:

Q I will try to make this as brief as possible. Could you please state your name and address for the record, please?

A Sia Akhavan, residing at 643 17th Avenue, Salt Lake City, Utah 84101.

Q Are you currently a United States citizen?

A I am and have been for seven years.

Q When did you first come to the United States?

A 1981.

Q You have been here for approximately eleven years?

A That is correct.

Q Could you briefly describe your work experience when you arrived in the United States, commercial sign business?

A When I first came to the United States, I proceeded to purchase Electronic Message Center and sell advertising on them. A year after that, I had proceeded to manufacture them and have been in the business of manufacturing signs since then.

Q Did there come a time when you obtained an ownership interest in a sign company called General Display?

A That is correct. That was in 1987.

Q Did there also come a time when you learned someone was interested in buying your interest in General Display?

A September 1989.

Q Who did you learn that from?

A From Joel LaSalle.

Q What did he tell you?

A He told me that Mr. Kaufman was interested in purchasing my interest in General Display, for the purpose of putting or merging it with a publicly-held company.

Q Did he set up a meeting with Kaufman to discuss the purchase?

A He did.

Q And describe that meeting?

A The meeting took place at his offices in Salt Lake City with two of his agents, Mr. Radcliffe and also

Mr. Manual Floor.

Q Approximately when that was meeting?

A Early October 1989.

Q What did you discuss in this meeting?

A We discussed Mr. Radcliffe--I mean Mr. Kaufman's interest in purchasing my interest in General Display for the purposes of merging it with the public-held company. We also discussed prices.

Q Did you reach an ultimate resolution as to what price Kaufman was willing to pay for your interest in General Display?

A We did.

Q Did you agree on any terms on how that price would be paid?

A No. The terms were to be negotiated over the next few days.

Q Did they tell you why Kaufman wanted to purchase your company?

A They explained that he had made a commencement to a company called F. N. Wolf. He desperately needed my company to merge with that publicly-held company.

Q Did you ever meet again with Radcliffe and Floor to discuss the terms of the purchase price?

A We did but we didn't come to any terms.

Q So what happened after that?

A Mr. Kaufman called me from Switzerland and he informed me that he was flying to Salt Lake to work out the conditions of the purchase. He assured me we would come to an agreement. I wouldn't have any further problems.

Q Did he come to Salt Lake City?

A He did very shortly after that.

Q Met with him to negotiate these terms?

A I did at his request.

Q Please describe that meeting.

A The meeting took place in his offices in Fort Union Boulevard, and we sat across the table and we negotiated the terms and conditions of the sale with him.

Q Let me hand you what's been marked plaintiff's one. Can you identify that document?

A Yes.

Q Can you describe that document?

A It's an agreement under which I sold my interest in General Display to Mr. Kaufman.

Q Does this contain the terms that you and Mr. Kaufman agreed to at that meeting you previously described?

A It does.

Q Okay. Can you tell us what happened after the meeting was over? After you reached an agreement with respect to the terms, what happened?

A Mr. Kaufman called Mr. Radcliffe into the room

and he asked Mr. Radcliffe -- told Mr. Radcliffe about the terms we had settled on. And he told him to go ahead and draft the document, and he told him to go ahead and sign the document on his behalf and purchase the stock in his behalf.

Q Is exhibit 1 the document that was drafted by Radcliffe pursuant to Mr. Kaufman's instructions?

A It is.

Q Does it contain the signatures of you and Radcliffe?

A It does.

Q We would ask for admission of exhibit 1.

THE COURT: It may be admitted. What was Mr. Radcliffe's interest in this agreement?

A He was the agent of Mr. Kaufman. As an attorney, he was acting on his behalf.

MR. HOLBROOK: I have an extra copy, if Your Honor would like.

THE COURT: I would appreciate it.

MR. HOLBROOK: All right.

Q Mr. Akhavan, if you would look at page one on paragraph four, it states the fifty thousand dollars would be paid as an initial payment of the purchase price. Do you see that?

A I do.

Q Was that fifty thousand dollars paid by Kaufman?
A It was paid by Mr. Kaufman.
Q How do you know that?
A I received the check and I proceeded to cash the check and they told me there wasn't sufficient funds. I called Mr. Kaufman's office, his secretary Carol, told me that that was impossible, that Mr. Kaufman had sent the money and she told me to go ahead and take a trip down. By the time I get there, she would have it resolved. When I went down there, she smiled and said that Kaufman had sent the money into the wrong account and she just had to make the transfer. And she told me to go ahead and go to the bank. I proceeded to go to the bank and cashed the check at that time.
Q She had told that you Kaufman had wired the money over from Switzerland into the wrong account or that she would transfer it into the proper account so you could cash the check?
A That is correct.
Q Paragraph four calls for payment of two hundred fifty thousand dollars over eighteen months. Do you see that provision?
A I do.
Q Was that money ever paid to you?
A It was not.

Q When the first installment of that money was not paid, what actions did you undertake to try to collect that?

A I proceeded to call Mr. Kaufman in Switzerland. After many conversations with, I believe, his secretary, she told me that Mr. Kaufman was to be in Salt Lake City shortly after that. So I --

THE COURT: Let me interrupt. I should be aware of what is going on here. I have had this case on my desk many times, but the agreement is between Radcliffe and Akhavan. How does Kaufman become involved in--

MR. HOLBROOK: Radcliffe, that's what I am trying to establish.

THE COURT: He was an agent?

MR. HOLBROOK: Acting as an agent.

THE COURT: There's nothing in this agreement speaking of a principal/agency relationship. The agreement is between Mr. Akhavan and Mr. Radcliffe.

MR. HOLBROOK: Right. But it is our contention that the agreement -- we have two claims, one that Radcliffe was acting as his agent, for Mr. Kaufman, and all the negotiations took place between Kaufman and Akhavan with respect to it. When there was a default, Akhavan contacted Kaufman and Kaufman assured he would be paid. The two grounds, one, breach of contract, Radcliffe was

merely acting as agent for Kaufman. Two, Kaufman was either fraudulent or misrepresented all these facts in causing Akhavan to execute this agreement.

You may continue. You were describing when you didn't receive payment, you contacted Mr. Kaufman, he was on his way to Salt Lake City?

A I called his office in Salt Lake City and went and met with him. He assured me that it was only the problem of the banks, and he had wired three months of the payments to Salt Lake City, that I was to be receiving it very shortly after.

Q When you contacted Kaufman to make these payments of two hundred fifty thousand dollars under the contract, did Kaufman ever say, "This is not my contract you need to look to Radcliffe for payments"?

A Not at all. Mr. Kaufman, on other occasions, had confirmed that was the contract with him and that he was very interested in the meeting we had in a club called the New Yorker here in town. He confirmed and thanked me for selling him my stock and how it would help him in being able to put this in a publicly-held vehicle.

Q At any time did Kaufman say, "Radcliffe is the one that needs to pay this money and I am not obligated?"

A No.

Q Did Kaufman in fact represent to you that he was

having his money transferred over from Switzerland so he would make the three payments under this agreement to bring it current?

A That is correct.

Q As a result of Kaufman's actions and misrepresentations, have you suffered damages as a result of this breach of contract?

A I have.

Q All right. First of all, in looking at paragraph four at the two hundred fifty thousand dollars -- let me step back. The initial sales price under the contract was for three hundred thousand dollars; is that correct?

A That is correct, with a bonus, additional purchase bonus.

Q All right, of the three hundred thousand dollars, you were paid fifty thousand dollars?

A That is correct.

Q So you have not been paid two hundred fifty thousand dollars?

A That is correct.

Q All right. If you look on page three under paragraph ten, there's a covenant not to compete. What does that covenant prevent you from doing?

A From engaging in any employment related to the

manufacturing, or selling signs, which was my area of expertise.

Q In fact, you had been engaged in the sign business since you arrived in the United States?

A That is correct.

Q You owned the sign company? You were an officer of that sign company?

A That is correct.

Q When you left General Display, what was your monthly salary?

A Ten thousand dollars.

Q If you were able to compete under this contract and either form a new sign company, or go to work for a competing sign company, what would you estimate your salary would have been?

A I would estimate it to be more than that, because of my experience.

Q More than ten thousand dollars?

A That is correct.

Q All right. But you did not compete?

A That is correct.

Q Why didn't you compete?

A Because I honored my commitment. I have made a commitment, based on this contract not to compete.

Q Did you seek alternative employment during that

two year period?

A I did.

Q What types of employment, jobs did you seek?

A Production management.

Q Of manufacturing plants?

A Manufacturing plants.

Q That was your forte in the sign industry production management of signs?

A Among other things.

Q Did you ever take another job?

A I did not.

Q Were any jobs offered to you?

A They were not.

Q When you were interviewing, what was the most monthly income that you had been -- that was available in production management?

A The highest job I applied for was for two thousand dollars a month.

Q I would like to focus on page three paragraph 7(G) where it refers to a lawsuit entitled General Display vs. the Walt Disney Company. Under that provision, it says you are entitled to receive twenty-five percent of any of the net proceeds from that lawsuit?

A Correct.

Q Just briefly describe how that came about and

how Mr. Kaufman had agreed to that.

A At the time I was controlling and managing General Display, I brought a suit against Walt Disney for using one of our designs and I was sure that I was right, so I was insisting that -- I needed a portion of that to sell my company. In other words, I wanted to keep a portion of that asset. It took a long time for Mr. Kaufman to agree to it. As a matter of fact, he went to the offices of Burbidge and Mitchell, who were handling the case, and he discussed it with them and looked at the complaint and everything else. And he was accompanied with his attorney, Robert Radcliffe, at the time and I understand that they got -- contacted the Walt Disney company before they made up their mind. Finally, they decided that they would allow me to keep twenty-five percent.

Q Was that lawsuit resolved?

A It was resolved.

Q All right. Do you know what the net proceeds were from that lawsuit?

A I believe the agreement called for a confidentiality. But from my involvement with the IRS at the time, I know that the IRS levied all the net proceeds which were a hundred seventy-three thousand dollars.

Q And you were involved with the IRS because you

were personally liable for a portion of General Display's tax liability?

A That is correct.

Q So after they had settled the lawsuit and the IRS had levied the proceeds, you became aware that the IRS had levied a hundred seventy-three thousand dollars?

A That is correct.

Q Turn to page four paragraph eleven, please. Under that provision, it calls for the prevailing party of the lawsuit to pay or to collect attorneys fees from the other party. Do you see that?

A Yes.

Q Tell me how that provision came about?

A It was the suggestion of Mr. Kaufman and I agreed to it.

Q So Kaufman had insisted upon the attorneys fees provision in the contract?

A That is correct.

Q Let me show you what's been marked as plaintiff's exhibit two. Can you identify plaintiff's exhibit two?

A Yes. These are my attorneys fees from year 1990, '91 and '92.

Q They relate directly to this lawsuit?

A They do.

Q All right, have you undertaken to calculate and prepare a summary of those attorneys fees?

A I have.

Q What is that final calculation for the three year's attorneys fees?

A Forty-four thousand two hundred twelve dollars and fifty cents.

THE COURT: Does this relate solely to the defense's treatment of this claim or defense of Radcliffe claim --

MR. HOLBROOK: I will put evidence on. In filing this lawsuit, if you had filed this lawsuit as a claim solely against Mr. Kaufman, prosecuted against Mr. Kaufman, would you have to undertake--would your attorneys have to undertake the same amount of discovery with respect to taking the depositions of Mr. Floor, Mr. Radcliffe, yourself, Jay Hansen?

A It would be almost identical. It would be identical.

Q So, in essence, in defending the Radcliffe claim, if you prosecuted claims against all the defendants, is roughly the same amount of discovery involved in each case?

A It is.

Q Let me show you what's been marked as

plaintiff's exhibit three.

THE COURT: Can you identify this document plaintiff's exhibit three?

A Yes.

MR. HOLBROOK: What is it?

A It's a summary of the economic damages that I suffered.

Q Let's go over it briefly. I have number one as the contract amount of two hundred fifty thousand dollars?

A That's the contract balance of two hundred fifty.

Q All right, and there's also an interest paragraph four, ten percent; is that correct?

A That is correct.

Q Under that you have subparagraph A which relates to interest only on the installment payments as they become due over eighteen months; is that correct?

A That is correct.

Q And then the interest from the day of those installments to the present; is that correct?

A That is correct.

Q On Roman Numeral II, damages relate to your covenant not to compete for two years?

A That is right.

Q Your salary while you were an officer, ten

thousand dollars a month?

A That is correct.

Q Your business officer of employment, three thousand dollars a month, for a net difference of seven thousand dollars a month?

A That is correct.

Q And I think three is General Display, Walt Disney proceeds hundred seventy-three thousand dollars?

A Yes.

Q Your entitlement to twenty-five percent interest in that?

A That is correct.

Q Item four is the attorneys fees that you have expended in this matter?

A That is correct.

Q And for a total damages of five hundred fifty-three thousand five hundred sixty-three dollars and fifty-three cents?

A Correct.

Q Item five, which we have not discussed before, the costs that you have incurred in this suit under Rule 54, you are entitled to recover certain costs in reviewing the financial -- The attorney billing statements on exhibit two, have you generated and listed those costs which you think you are reasonably entitled to under that?

A Yes.

Q Is that a correct description of those costs?

A Correct.

Q We would ask that exhibits two and three be admitted into evidence, Your Honor.

THE COURT: They are admitted.

MR. HOLBROOK: That's all the testimony I have for Mr. Akhavan.

THE COURT: You may step down.

MR. HOLBROOK: I would like to call Eric Patterson to the stand.

DAVID ERIC PATTERSON

called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOLBROOK:

Q Mr. Patterson, could you state your name and address for the record, please?

A My name is David Eric Patterson. I live at 1580 Northeast Hills Drive in Bountiful Utah.

Q Could you give us a brief background of your work experience in the electronics industry?

A Sure. I have been working as an electronics engineer, consultant and been an electronic technician for twelve years now.

Q Did there come a time when you did electronic work for General Display?

A I worked first as a consultant. Then I was an employee of General Display.

Q Roughly in the end of 1986 until the beginning of 1990?

A That is correct.

Q Did there come a time when Joel LaSalle, president of General Display, made an announcement that Roland Kaufman was going to purchase Sia Akhavan's interest in General Display?

A Yes.

Q Could you describe the events surrounding that?

A Mr. LaSalle who's the presiding officer of General Display at the time called a meeting for all employees, which included myself among many others--proceeded to announce Mr. Akhavan was present and he proceeded to announce that Mr. Akhavan was selling his shares of the company to Mr. Kaufman and that Mr. Kaufman was going to institute many other things along with taking over Mr. Akhavan's ownership interest in the company.

Q Did that include fees and capital to help General Display's current financial --

A That was mentioned specifically because it was very important to the employees, and there were several

questions asked about that.

Q Was Mr. Kaufman present at this meeting?

A That is correct.

Q Did Mr. Kaufman at any time confirm LaSalle's statement that he was purchasing Akhavan interest in General Display?

A After several minutes of speaking by Mr. LaSalle, Mr. Kaufman took several minutes, indicated that he was happy for the opportunity of purchasing Mr. Akhavan's shares, had complimented Akhavan on the job he had done bringing the company up to that point, and he was looking forward to working with the company in proceeding--trying to help the company grow and such.

Q I have nothing further of this witness.

THE COURT: You may step down.

MR. HOLBROOK: We would call Michael Beck.

MICHAEL BECK

Called as a witness, having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOLBROOK:

Q Would you please state your name and address for the record.

A Michael V. Beck 884 North 140 West, American Fork.

Q Could you give a brief description of your educational background?

A Yes. And I have bachelor's degree in accounting from Brigham Young and master's degree in taxation from Brigham Young.

Q Could you give us a brief background of your work experience in the accounting field?

A Yes. Right after the University I started with Peat Marwick, a big firm here in Salt Lake City. After two and a half years with them, I transferred to Arthur Anderson and Company, here in Salt Lake City, I spent two years with them. I am now a partner in a CPA firm in American Fork, have been for the last two years.

Q All right, in the course of working with those three accounting firms, was your primary background with respect to taxation accounting?

A Correct, all areas of taxation.

Q And in the course of dealing with tax work, were you called upon to value companies?

A Yes. Companies, division of companies and equipment and assets of companies for gifting, and the estate area, and also for valuing of trusts, and also in the area of pension planning for employee stock ownership

plans. All companies are required to have valuations, and also in general accounting valuation.

Q In the course of your work, you have done valuations, have rendered opinions on the values of clients' companies?

A Correct.

Q Can you briefly describe methods of valuing companies, book value of the company, income value, good will?

A There are basically three areas that make up a value of a company. It would be the inherent value of the assets. Let's say they have land or something that has increased greatly, you would attempt to get a fair market of those assets as opposed to the liabilities and come up with a value of those assets. Or you would value the income streams by placing some sort of capitalization rate on the the net income of the company from the past few years. There's a value attached to the name and good will of the company.

Q In this case you have been asked to render an opinion as to the value of General Display as of the end of May of 1992; is that correct?

A Correct.

Q General Display is currently in bankruptcy; is it not?

A Yes.

Q During the course of your valuations, do you briefly describe the documents that you looked at before you rendered an opinion of General Display?

A Yes. We gathered information--I gathered information regarding the sales. All this information is for a six months, five month period from January 1 of '92, through May 31 of '92. The information we gathered was pertaining to the sales, the accounts receivable, the accounts payable, the assets, liabilities, cash flow, disbursements, all areas of income.

Q And you had in fact been the primary independent accountant of General Display since February of 1989?

A Correct.

Q You have prepared their income tax statements?

A Returns.

Q Returns, I am sorry, since 1989, in fact the returns of '87?

A They were clients of Arthur Anderson. When I left Arthur Anderson I took work with me.

Q You are aware of the accounting procedures of General Display?

A Yes.

Q From the history that you have previously testified to, have you reached an opinion of the value of

General Display as of May 31, 1992?

A It has no value. The company has approximately nine hundred thousand dollars of negative retained earnings.

THE COURT: What are negative retained earnings?

A That means that the liabilities of a company far outweigh any assets. The company has approximately a million dollars of current liabilities.

THE COURT: How many?

A A million dollars, and hard assets approximately three hundred thousand dollars,

THE COURT: Negative net worth then, is that it?

A Correct.

THE COURT: Liabilities exceed assets by that?

A Correct.

MR. HOLBROOK: Did you also try to value it through the income approach?

A Yes. Over the last eighteen months, the company has had a negative net income; therefore, any type of income capitalization isn't appropriate because any capitalization that you put on those income flows, once again, are in the negative because it's never been in a positive cash flow or positive income.

THE COURT: Is it operating-- What kind of bankruptcy?

MR. HOLBROOK: Chapter 11.

A A reorganization.

MR. HOLBROOK: In this chapter 11 phase, is the operating income limited?

A Yes.

Q Is there any ability to grow as a company?

A That's a hard one to judge. Any future value of the company would have to come from--it would be built from ground zero.

Q Did you find any value with respect to the good will of General Display?

A I made contacts with customers of General Display, that have been customers over the last eighteen months. I also have written documentation from other customers. In all cases, the value of the work that has gone on over the last eighteen months or two years is very poor. They have complaints about the workmanship, all needed to be replaced and the main value of General Display out to the public, once again, value is zero.

Q So in essence, in valuing through the book value income approach, you have concluded there's no value. That's because you can only go in the negative?

A You never value in the negative value.

MR. HOLBROOK: Thank you. That's all I have.

We would submit it on that basis, and based upon

the evidence that's been adduced, we think that we are entitled to five hundred fifty-three plus thousand in damages and also the costs.

THE COURT: As hard as I tried, I couldn't find a copy of your counterclaim in the file, but I assume that your counterclaim states causes of action alleging breach of contract and the measure of damages being the contract amount which is unpaid. The covenant not to compete, is that specifically stated as a cause of action?

MR. HOLBROOK: I am not -- no, I think it is just as a general arising from the contract, Your Honor.

THE COURT: I have a little difficulty understanding what you are claiming on that quite frankly. He would have -- he did not compete for the period of two years. I take it that he was required not to compete but he engaged in the running of this business for a period of time, didn't he.

MR. HOLBROOK: No, he did not -- I can put him back on.

THE COURT: That's all right.

MR. HOLBROOK: He did not take over and go back into General Display until January of '92, so it was after two years had run and that was basically the business in the interim was supposed to be run by Joe LaSalle and Kaufman and his agents.

THE COURT: You are asking me to give him the difference between what he was earning at the time that he entered into this agreement and what he actually in fact earned during that period of time?

MR. HOLBROOK: The best money he could have earned.

THE COURT: All right. The court will award him damages in the amount as indicated on plaintiff's exhibit 3 together with attorneys fees and costs.

THE COURT: Prepare your findings of fact and conclusions of law.

MR. HOLBROOK: Thank you very much.

THE COURT: We will recess.

(whereupon the hearing concluded)

CERTIFICATE OF COURT REPORTER

THE STATE OF UTAH)

COUNTY OF SALT LAKE)

I, Cathy Gallegos, a Certified Shorthand Reporter of Salt Lake County, Utah, do hereby certify that the above and foregoing typewritten pages contain a full, true and correct transcription of my shorthand notes taken upon the occasion set forth in the caption hereof, as reduced to typewriting by me or under my direction.

Witness my hand, this 6th day of December, 1992.

Cathy Gallegos, CSR RPR

Tab H

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ROBERT D. RADCLIFFE, Plaintiff, vs. SIA AKHAVAN, and individual, JOEL M. LASALLE, an individual, GENERAL DISPLAY CORPORATION, and DOES 1 through 10, inclusive, Defendants.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Case No. 900900439CV Judge James S. Sawaya
SIA AKHAVAN, Counterclaimant, vs. ROBERT D. RADCLIFFE, Counterclaim Defendant, REPUBLIC INTERNATIONAL CORPORATION and ROLAND KAUFMANN, and DOES 1 through 10, inclusive, Additional Counterclaim Defendants.	

The above-entitled matter came on regularly for trial to the bench, the Honorable James S. Sawaya, presiding, on July

7, 1992 at the hour of 10:00 a.m. with respect to the claims and counterclaims as between Counterclaimant Sia Akhavan ("Akhavan") and Counterclaim Defendant Roland Kaufmann ("Kaufmann"). Akhavan appeared in person and through his counsel, Douglas H. Holbrook of Burbidge & Mitchell. Kaufmann and his trial counsel did not appear to defend against Akhavan's claims. Kaufmann's special counsel, Paul Durham of Durham & Evans, appeared only with respect to Kaufmann's Motion for Continuance of Trial, but did not appear with respect to Kaufmann's interests for trial.

The court having taken evidence in the matter, having considered the same, and being advised in the premises, hereby makes the following:

FINDINGS OF FACTS

1. Kaufmann was properly served with process in this action and by Stipulation agreed and submitted to this court's jurisdiction over him. Since November of 1990, Kaufmann has been represented by competent counsel from the law firm of Metzger, Gordon, Scully & Mortimer and Leslieann Haacke, as local counsel.

2. This case was set for trial in March of 1992, but was continued at Kaufmann and his counsel's request.

3. Kaufmann's counsel filed a Motion to Withdraw as counsel of record on June 6, 1992, and in said motion represented that Kaufmann could not appear at trial, either in person or through counsel.

4. Kaufmann further represented to the court, by letter dated July 1, 1992, that he would not appear at trial.

The court denied Kaufmann's counsel's Motion to Withdraw and informed Kaufmann and his counsel that if no appearance was made at trial, then a default would be entered against them.

5. Kaufmann and his counsel failed to appear at trial in this matter despite adequate notice of the trial.

6. In September of 1989, Akhavan owned an interest in General Display, Inc., a business engaged in manufacturing and selling commercial signs. At this time, Akhavan was told by Joel LaSalle, president of General Display, that Roland Kaufmann was interested in buying Akhavan's interest in General Display. Akhavan attended a meeting in September of 1989 with Robert Radcliffe and Mannie Floor, who identified themselves as agents for Kaufmann. At this meeting the sale of Akhavan's shares to Kaufmann was discussed. Akhavan and Kaufmann's agents reached an agreement with respect to the price of the shares, but not with respect to the terms of payment.

7. At this meeting Akhavan was told that Kaufmann wanted to use General Display to merge with a public shell corporation and subsequently make a public offering.

8. Akhavan was never able to reach agreeable terms with Kaufmann's agents, so Kaufmann came to Salt Lake City from Switzerland to negotiate the terms of purchasing Akhavan's shares. Akhavan attended a meeting with Kaufmann in October of 1989 at Kaufmann's office on Fort Union Boulevard.

9. At this meeting, Kaufmann communicated that he was very interested in buying Akhavan's stock in General Display.

Kaufmann and Akhavan agreed upon the terms of Kaufmann's purchase of Akhavan's interest in General Display. The agreed upon terms were subsequently set forth in Exhibit 1. These terms included, but not were not limited to:

(a) Purchase price of $300,000.00, payable $50,000.00 immediately with the balance of $250,000.00 to be paid over 18 months at an interest rate of 10%;

(b) Akhavan agreed not to work or compete in the commercial signage industry. This covenant not to compete was for a period of two years;

(c) Kaufmann and Akhavan agreed that Akhavan would receive 25% of the net proceeds from any judgment or settlement of the lawsuit entitled General Display Corporation v. The Walt Disney Company; and

(d) If any lawsuit arose from their agreements, the prevailing party would be entitled to attorney's fees.

10. After entering into the agreement with Akhavan, Kaufmann visited the General Display offices and manufacturing plant and informed the employees the he was buying Mr. Akhavan's shares in General Display and would be infusing capital into General Display to enhance its operation.

11. Kaufmann made certain representations or omitted to provide facts subject to his purchase of Akhavan's shares which he knew were false and/or made with reckless indifference

to their truth or falsity. These representations were made with the intent to induce Akhavan's reliance and cause Akhavan to enter into the contract for the sale of his interest in General Display to Kaufmann. Akhavan reasonably relied on Kaufmann's representations which were material to his decision to enter into the agreement for the sale of his interest in General Display to Kaufmann.

12. Akhavan was paid the $50,000.00 by Kaufmann, but was never paid any other amounts owed under their contract.

13. Akhavan contacted Kaufmann with respect to the remaining payments under their contract. Kaufmann informed Akhavan that he had wired three payments to Akhavan. At this time, Kaufmann never stated or told Akhavan to look to someone else for payments on their contract, but expressly agreed that he would be making the payments.

14. While employed at General Display, Akhavan was earning $10,000.00 per month as salary. His salary was based upon his substantial experience in the commercial sign industry. Upon entering into the contract with Kaufmann, because of the covenant not to compete, Akhavan was not able to obtain a job in the commercial sign industry, but was forced to seek jobs as production managers of manufacturing plants. The highest salary Akhavan would have been able to earn as a production manager would have been $3,000.00 a month.

15. Akhavan was not paid any money from the net proceeds of the General Display v. Walt Disney lawsuit. The net proceeds were $173,000.00 of which Akhavan is entitled to 25%.

16. Akhavan had incurred attorney's fees in prosecuting this action against Kaufmann in the amount of $44,212.50. Akhavan would have incurred these expenses if this suit was filed against Kaufmann alone, irrespective of the claims against Radcliffe and Republic International Corporation because the discovery which was necessitated in prosecuting claims against all parties was identical.

17. Akhavan is entitled to the difference between the contract price, $250,000.00 of which is owed and outstanding, and the current value of General Display which is zero. Akhavan is entitled to $7,000.00 a month under the covenant not to compete for 2 years. Akhavan is entitled to 25% of $173,000.00 and his costs and attorney's fees.

The court having made the foregoing Findings of Fact, it now makes the following:

CONCLUSIONS OF LAW

1. Kaufmann was properly served with process in this action and by Stipulation agreed and submitted to this court's jurisdiction over him. Since November of 1990, Kaufmann has been represented by competent counsel from the law firm of Metzger, Gordon, Scully & Mortimer and Leslieann Haacke, as local counsel.

2. This case was set for trial in March of 1992, but was continued at Kaufmann and his counsel's request.

3. Kaufmann's counsel filed a Motion to Withdraw as counsel of record on June 6, 1992, and in said motion represented that Kaufmann could not appear at trial, either in person or through counsel.

4. Kaufmann further represented to the court, by letter dated July 1, 1992, that he would not appear at trial. The court denied Kaufmann's counsel's Motion to Withdraw and informed Kaufmann and his counsel that if no appearance was made at trial, then a default would be entered against them.

5. Kaufmann and his counsel failed to appear at trial in this matter despite adequate notice of the trial.

6. There was a valid and binding contract entered into between Akhavan and Kaufmann under the terms set forth in Exhibit 1.

7. Kaufmann, in connection with negotiations for executing the contract with Akhavan, made certain representations to Akhavan which Kaufmann knew to be false and upon which Akhavan relied upon in entering into the contract with Kaufmann. Kaufmann's breaches and misrepresentations have caused Akhavan to suffer damages in the amount set forth in Exhibit 3. Akhavan is entitled to judgment against Kaufmann in the amount of $553,563.53 and costs of $3,006.59.

DATED this 16 day of July, 1992.

By the Court:

JUDGE JAMES S. SAWAYA
Third District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Findings of Fact and Conclusions of Law was mailed, postage prepaid, this 15th day of July, 1992, to the following:

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CH-8024 Zurich
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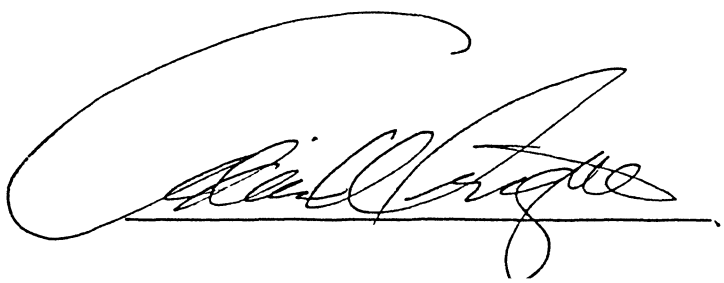

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Tab I

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BURBIDGE & MITCHELL
Attorneys for Defendant and
Counterclaimant Sia Akhavan
139 E. South Temple, Suite 2001
Salt Lake City, Utah 84111
(801) 355-6677

JUL 16 1992

By S. Stenosky Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

2175872
7-17-92-8:00am

ROBERT D. RADCLIFFE,

Plaintiff,

-vs-

SIA AKHAVAN, an individual, JOEL M. LaSALLE, an individual, GENERAL DISPLAY CORPORATION, and DOES 1 through 10, inclusive,

Defendants.

SIA AKHAVAN,

Counterclaimant,

-vs-

ROBERT D. RADCLIFFE,

Counterclaim Defendant

REPUBLIC INTERNATIONAL CORPORATION and ROLAND KAUFMANN, and DOES 1 through 10, inclusive,

Additional Counter-claim Defendants.

DEFAULT ORDER AND JUDGMENT

Case No. 900900439 CV

Judge James S. Sawaya

1050

The above-entitled matter came on regularly for trial to the bench, the Honorable James S. Sawaya, presiding, on July 7, 1992 at the hour of 10:00 a.m. with respect to the disposition of claims and counterclaims as between Counterclaimant Sia Akhavan ("Akhavan") and Counterclaim Defendant Roland Kaufmann ("Kaufmann"). Akhavan appeared in person and through his counsel, Douglas H. Holbrook of Burbidge & Mitchell. Kaufmann did not appear in person and Kaufmann's counsel, Paul Durham of Durham & Evans, appeared specially with respect to Kaufmann's Motion for Continuance of Trial only, but did not appear with respect to Kaufmann's interests for trial.

Pursuant to the court's prior rulings that if Kaufmann and his counsel failed to appear for trial a default judgment would be entered, the court, having taken evidence in the matter with respect to the issue of damages, attorney's fees and costs of suit, having considered the same and being fully advised in the premises, and having entered its Findings of Fact and Conclusions of Law;

HEREBY ORDERS, ADJUDGES AND DECREES the following:

1. A Default Judgment is hereby granted in favor of Counterclaimant Akhavan and against Counterclaim Defendant Kaufmann in the amount of $553,563.53 in damages (including attorney's fees) and the further amount of $3,006.59 in costs of suit, for a total judgment sum of $556,570.12.

2. Said judgment in the amount of $556,570.12 shall bear interest at the judgment rate of 12% per annum from and after July 7, 1992 until paid in full.

DATED this 16 day of July, 1992.

BY THE COURT:

THE HONORABLE JAMES S. SAWAYA
THIRD DISTRICT COURT JUDGE

js akhavan\judg

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a copy of the proposed Default Order and Judgment to the following parties by depositing the same in U.S. mails, postage prepaid, this 15TH day of July, 1992:

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